No. 85.

Brf. of Warburton & Burleigh

IN THE

United States Supreme Court.

Filed Oct. 11, 1898.

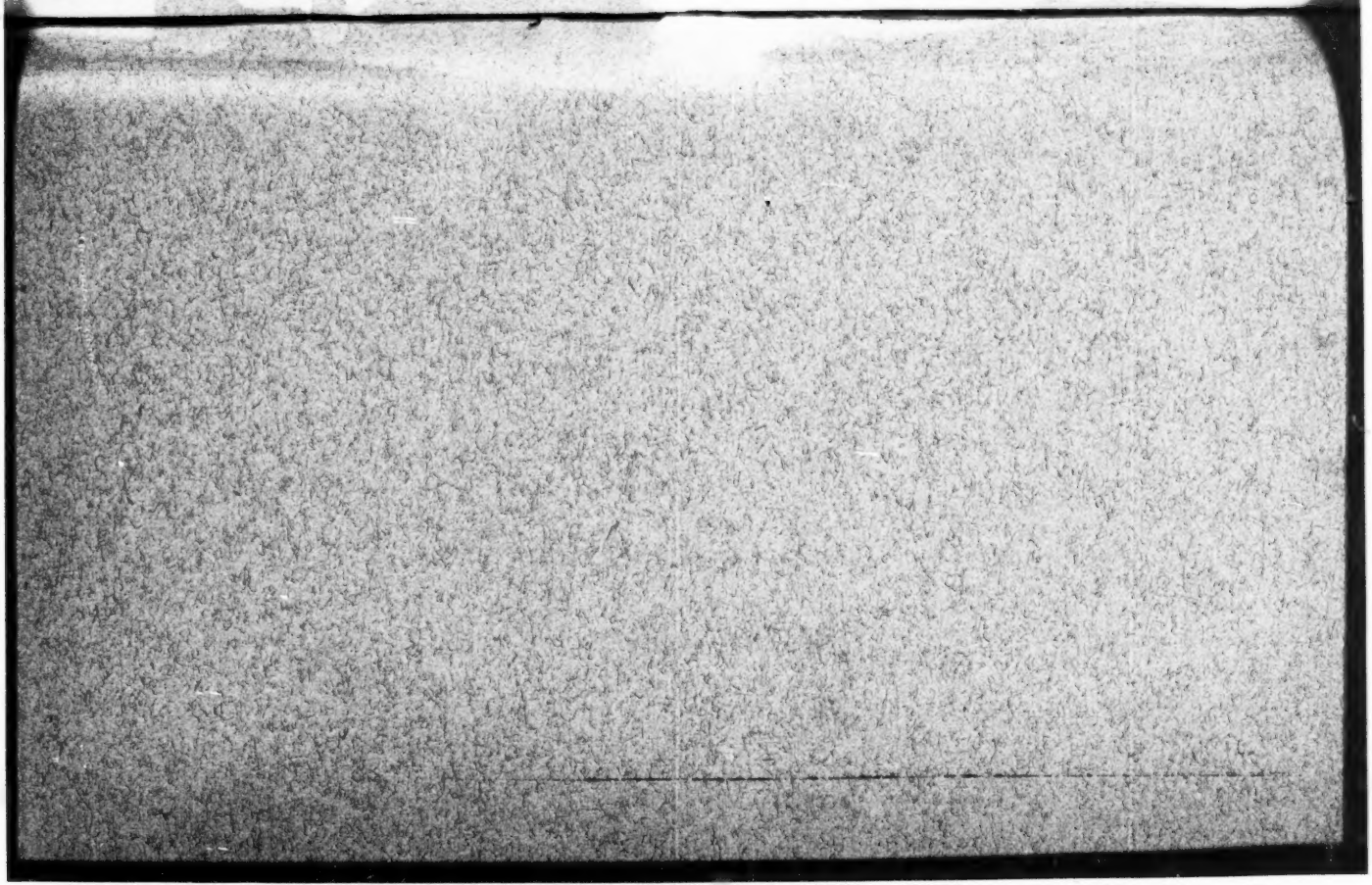
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,
versus
NELLIE PHINNEY, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF GUY C. PHINNEY, DECEASED,
Defendant in Error.

No. 85.

On Certiorari to the Ninth Circuit Court of Appeals.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STANTON WARBURTON,
Attorney for Defendant in Error,
A. F. BURLEIGH,
of Counsel.



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Statement and Argument on Motion to Dismiss.

The original writ of error sued out in this cause was returned by the clerk of the Lower Court to the Circuit Court of Appeals without any endorsement or evidence that the same had been filed. The Circuit Court of Appeals dismissed the writ on the grounds that there was no evidence that the same had been filed in the Lower Court. We maintain that the Circuit Court of Appeals for the Ninth Circuit was right in granting the motion of defendant in error to dismiss.

I.

THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS DID NOT OBTAIN BECAUSE THERE WAS NO EVIDENCE IN THE RECORD OF THE FILING OF THE WRIT. IT IS THE FILING OF THE WRIT WHICH DEPRIVES THE LOWER COURT OF JURISDICTION AND GIVES IT TO THE UPPER COURT.

Now what is the law with regard to filing writs of error?

The original judiciary act of 1789, the act of 1792, which provides that the writ of error may be sued out either from the Supreme Court of the United States or from the Circuit Court of the United States (under this act the form of a writ of error was devised by the justices of the Supreme Court and transmitted to the clerks of the Circuit Courts); and the act of 1803, which separates appeals in equity and admiralty from writs of error in law cases, but subjects appeals to the same rules and regulations and re-

strictions as are or may be prescribed in law in cases of writs of error, as interpreted and construed by the courts; are all not only *sub silentio*, but *expressly* included and re-enacted in the 11th section of the judiciary act of 1891,—the act establishing this court,—a portion of which 11th section reads:

"All provisions of law now in force regulating the methods and system of review through appeals or writs of error shall regulate the methods and system of appeals and writs of error provided for in this act * * * ."

If the act of 1891, had merely authorized appeals and writs of error without reference to previous provisions of law, the provisions of all these judiciary acts would still apply. Castro vs. U. S., 3 Wall, 46, 51; U. S. vs. Pacheco, 20 How., 261, 264, Thomas vs, Harvie's Heirs, 10 Wheat 146.

"Brought" in the original judiciary act of 1789, and in the Revised Statutes, Section 1008, is equivalent to "sued out" in the same original act, as amended, and in the Revised Statutes, section 635, and in the judiciary act of 1891, section 11. This is illustrated and acted upon in every case involving the time within which review by appeal or by writ of error in an appellate court can be had. The cases which follow sufficiently sustain this interpretation and construction.

A writ of error then is not brought or sued out, in the legal meaning of the term, until filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court and gives that court jurisdiction of the case. The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question of jurisdiction.

The leading case on the subject is so short and to the

point, that we beg to quote nearly the whole of it. Chief Justice Taney delivered the opinion of the court.

"This case is brought here by writ of error * * * and a motion has been made to dismiss the writ. It appears by the record that the judgement was rendered on the 25th day of October, 1843. The writ of error by which the case is brought here was allowed on the 19th day of October, 1848, and the bond also bears date on that day. But the writ of error was not issued until the 4th of November following. It was issued by the clerk of the court in which the judgment was rendered and on the same day, *as appears by endorsement upon it, filed in that office* by the counsel for the plaintiff in error. More than five years from the day of judgment had therefore elapsed *when this writ of error was filed.*"

The act of 1789 c. 20, Section 22, provides that writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of. *The writ of error is not brought in the legal meaning of this term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior court to the appellate court,* and the period of limitation prescribed by the act of congress must be calculated accordingly. *The day on which the writ may have been issued by the clerk, or the day on which it is tested, are not material in deciding the question.*

"In this case, therefore, five years had elapsed before the writ of error was brought and the limitation of time in the act of congress was a bar to the writ. According to the English practice the defendent in error must avail himself of this defense by plea. * * * But according to the established practice of this court he need not plead it, but may take advantage of it by motion. The forms of proceeding in the English courts of error have never been adopted or followed in this court, and either party, without any formal assignment of errors, or plea, may avail himself of any objection *which appears upon the record itself.* In this case the bar arising from the lapse of time, is *apparent on the record*

and the defendant may take advantage of it by motion to quash or dismiss the writ. * * * The writ must be dismissed upon the ground that it is barred by the limitation of time prescribed by the act of congress." Brooks vs. Norris, 11 How., 204-208.

According to this case the question of the jurisdiction of this court not only turns upon the *filing and endorsement thereof of this writ in the court below but any objection apparent upon the face of the record can be taken advantage of by motion to quash or dismiss the writ.* This case not only decides our motion but *justifies* us in thus bringing the question up by motion.

And this case does not stand alone. It is cited and followed in a long line of cases, federal and state. Mussina vs. Cavazos, 6 Wall., 355, 363; Cummings vs. Jones, 104 U. S., 419: Scarborough vs. Pargoud, 108 U. S., 567 (2 S. C. R. 877); Pollys vs. B. R. Impt. Co., 113 U. S., 81 (5 S. C. R. 369); Credit Co. vs Ry. Co. 128 U. S., 258, (9 S. C. R. 107,); Farrar vs. Churchill, 135 U. S. 609 (10 S. C. R. 771); U. S. vs Baxter, 51 Fed. (C. C. A.) 624; U. P. Ry. Co. vs. C. E. Ry. Co., 54 Fed. (C. C A.), 22; Warner vs. T. & P. Ry. Co., 54 Fed., (C. C. A.), 920, 921, 922; Stevens vs. Clark, 62 Fed. (C. C. A.), 321, Threadgill vs. Platt, 71 Fed., 1; Crippin vs. Livingston, 12 Fla., 638; and Wright vs. Hughes, 2 Green, (Iowa), 142.

If there is safety in the multitude of authorities, we are certainly safe in our contention and position.

What does the term filing mean? Burrill's law dictionary defines it thus:

"Delivering the paper (endorsed with the title of the cause and attorney's name) to the clerk of the court in which the action is pending, who marks it 'FILED,' adding

the date, and deposits it, under the proper head among the papers, or files, in his office."

This is substantially the definition of filing found in all the law and other dictionaries. Some of them like Burrill's, Black's, Webster's International, and the Standard Dictionary, give a double definition.

"To 'file' a paper on the part of a party, is to place it in the official custody of the clerk. To 'file' on the part of the clerk is to endorse upon the paper the date of its reception, and retain it in his office subject to inspection by whomsoever it may concern."

We, of course, maintain that THE ACT OF FILING HATH THESE TWO BRANCHES AND THAT THE FULL AND PROPER DEFINITION OF FILING EMBRACES THEM BOTH. If authority is needed we have it. Foster in his work on federal practice, says;

"No paper is considered filed unless it has the proper endorsement by the clerk." I Foster, Fed. Prac. 598.

"No paper is filed unless it has the proper endorsement of the clerk, merely placing it in the court papers is no filing. A promissionary note or bond upon which suit is brought, though introduced in evidence, is not filed and can be withdrawn. 'Tis not considered '*received and filed*,' nor is it entered in the court calendar." Amy vs. Shelby Co., 1 Flippin, 104 (C. C. 6 C. Aug. 7, 1872.)

"In regard to filing the orders to pay to which the signature of the judge is attached, SUCH PAPERS BELONG TO THE FILES OF THE COURT AND SHOULD BE MARKED 'FILED,' BY THE CLERK FOR IDENTIFICATION." Erwin vs. U. S., 37 Fed. 470, 484.

Almost every case concerning clerk's fees in the United States Courts involves this question and necessitates this interpretation of the definition of the word "filing."

'Tis matter of common knowledge that rules and regulations of the Department of Justice requiring certain papers,

reports and vouchers, to be filed, require them to be marked or endorsed *filed.* If every paper or thing, left in the custody of the clerk, or in the clerk's office, were considered filed whether marked "filed," or entered in the register as "filed," or not, the clerk's responsibilities would be very much enlarged, and persons would be afraid to leave anything at the clerk's office. The bare statement of "such a state of things" shows its absurdity. A clerk frequently receives a paper or document and keeps it to be filed when his fees are paid, and it is generally considered that he has a perfect right to do this.

Even if "depositing in the proper office" were "filing" in English practice, our law and practice have changed that (Brooks vs. Norris, 11 How. 204-208) and our federal courts are governed by their own laws and their own practice. But, if we may judge from the defination of filing a bill in chancery given by Daniel in his work on chancery practice, English practice is very like our own in this respect.

"Bill in chancery—how filed."

"The clerk of records and writs dates it the day that it is brought into his office, numbers it, and receives it into his custody, the bill is then said to be *filed* and of record, but *before this process is completed, it is not of any effect in court,* and persons to be made parties have no right to take copies of it." Dan. Chan. 2nd Am. Ed. 468-9, Star paging 454.

Of course there may be found some loose definitions of filing scattered through the books, but they serve only as exceptions to prove the proper definition of the term.

In Iturbide's Executors vs. United States, 22 Howard, 290, a statute requiring the *filing* of a bond is held to be mandatory.

An order denying a motion for a new trial signed by the

judge *does not become effective until filed of record in the clerk's office.* Danielson vs. Fuel Co., 55 Fed., 49.

The decision of the state courts though not authoritative upon this question in this court, are on the whole, in line with those already given.

The leading case on this subject in this State is Tregambo vs. Comanche M. & M Co., 57 Cal. 501, which gives only the partial definition of filing. It defines filing on the part of the party or attorney only. "In this state a paper is deemed filed when delivered to the clerk and the clerk's fees paid if demanded." We do not dispute this definition as far as it goes. We only claim that it does not cover the ground. Smith vs. Biscailuz, 83 Cal. 539, holds that "It is premature to enter the default of a defendant whose demurrer is on file undisposed of although the demurer has not for want of fees paid been endorsed filed. 'Tis an old rule, and it was the rule of that court, that demurrers *interposed* should be disposed of before the case could be tried on its merits.

In Howell vs. Slauson, 83 Cal. 544, 'tis held that a list endorsed "list No. 1 Received and filed December 5, 1870," was (of course) filed.

In the case of Holman vs. Chevallier, 14 Tex. 339, a state statute allowed and execution to issue on a judgment after the death of the plaintiff, upon an affidavit of death entered of record or filed with the clerk, together with a certificate of appointment of a legal representative of the deceased plaintiff. There is no doubt that the state law had been sufficiently complied with. The presumption in favor of all judgments which cannot be collaterally attacked was also invoked in this case. The case of Turner vs. State, 41 Tex. 549, referred to in a note to a late edition of Texas Reports in connection with the last case, holds that the omission of a

file-mark upon a bail bond would not effect the liability of the obligors on the bond. Of course not.

All the other State Court cases which we have examined, and we have endeavored to examine them all, are all strong in our favor, except prehaps a few that follow some particular provisions of State statutes, and so would not apply to our case. Pfirman vs. Henkel, 1 Bradw. (I 11 App.) 145: Peterson vs. Taplor, 15 Georgia 483 (60 Am. Dec. 705).

Powers vs. State, 87 Ind., 144, 148, arose under a State statute which only required papers to be deposited in the clerk's office, and besides, it was held that the objection to the want of filemark came too late after trial and conviction. The case of Johnson vs. Crawfordsville 11 Ind. 284 arose under a State statute which made a certified copy of articles of incorporation legal evidence, so that the question of filing or filemark cut no figure in the case. Naylor vs. Moody, 2 Blacks (Ind.) 247, held that under a State statute requiring letters testamentary to be recorded, filing them was not a compliance with the statute.

Under a statute requiring an original document, or a copy thereof, to be filed with the pleadings, it was held that the act was complied with when the document was set out in haec verba in the pleadings. (Of course.) "The mere leaving with the clerk not suffieient unless the purpose of so leaving stated and not left to inference." Lamson vs. Falls, 6 Ind., 309. In Engleman vs. State. 2 Ind., 91, a defendant appeared, pleaded to an indictment, entered into a recognizance for his subsequent appearance, applied for and obtained a charge of venue, was tried and convicted, after all which he objected in an appellate conrt that the indictment had not been properly filed. It was held not that the endorsement was not necessary but that the objection came too late.

"Filing signifies more than mere endorsement to that effect, and comprehends entries made by the clerk on the record." Johnson vs. Hodges, 65 Mo., 589.

In Shore vs. Larsen, 22 Wis., 137-8, a mortgage duly received for record having time when received endorsed upon it held (of course), duly filed. In Smith vs. Waggoner, 50 Wis., 155, 160, it is held "the filing and endorsement are the principal things to be done. Entries in the book not essential." See also to same effect Marlet vs. Hinman, 45 N. W., (Wis.) 953.

"Plaintiff cannot contradict clerk's record and show that the certificate was received to be filed and not to be recorded." Chapin vs. Kingsbury, 138 Mass., 194. Recording not compliance with statute requiring "filing." Chapin vs. Kingsbury, 135 Mass., 580. "Clerk's certificate endorsed on instrument is conclusive that it was recorded at the time named therein." Fuller vs. Cunningham, 105 Mass., 442; Tracy vs. Jenks, 15 Pick., 465; Jordan vs. Farnsworth, 15 Gray, 517. Under a statute not requiring endorsement a paper left in the safe at a clerk's house and office held filed. Reed vs. Action, 120 Mass., 130.

Held mortgage not filed for record until instructions given to record, and then, antedating filing to date of actual delivery of paper to officer, of no effect. Deadman, vs. Eagle, 52 Ark., 164: Citing Brown vs. Fassett, 37 Ark., In last case held mortgage not filed though endorsed filed, the words "for record" being erased.

A chattel mortgage was endorsed by a person who had charge of the town clerk's office, "Filed October 20, 1845," and placed among chattel mortgages in the office: Held this was a filing, Bishop vs. Cook, 13 Barb. 326; Dodge vs. Potter, 18 Barb., 193.

"Filing a paper is now understood to consist in placing it in the proper official custody, on the part of the party charged with the duty of filing it, and the making of the appropriate endorsement by the officer." Phillips vs. Beene's Adr., 38 Ala. 248.

A warrant deputizing an under sheriff filed with the clerk need not be endorsed to make it valid. (Of course not.) Haines vs. Lindsay, 4 Ohio, 88.

All pleadings should be endorsed by the clerk when filed but party deemed to have waived his right to object on on that account, after plea, verdict or judgment. Fanning vs. Fly, 2 Coldw. (Tenn.) 486.

"Filing imports more than a mere reception into the custody of the clerk of the Court; his endorsement is necessary. Pinders vs. Yager, 59 Iowa, 468.

Under State statutes curing every conceivable defect in legal papers endorsement would not, of course, be necessary.

Rex vs. Wade, 1 B. & A., 861, gives definition of filing on the part of a party or attorney. Only *quaere* as to whether filing is good without endorsement.

A paper is not filed until it reaches place of final custody. Not when it first comes into the hands of the officer of the court. Garlick vs. Sangster, 9 Bing. 46.

"There is a paper forming a part of the supposed record, which appears to be signed by the judge of the district court as a bill of exceptions. It is, however, devoid of any filing mark indicating that it ever came into the hands or the office of the clerk of that court. It is not authenticated by any sort of certificate of such clerk, or by the seal of the court. The signature of the judge imparts vitality to a bill, and authorizes it to form a part of the record in the cause. When it has become such, it requires the certificate of the clerk of the court, who is the custodian of the records, to properly authenticate it as either the original or a transcript thereof. How is this court to know that any paper is one of the originals filed in the cause in the

court below, unless that fact is certified to by the clerk? We may recognize the signature of a judge appended to a bill by reason of the personal familiarity of one or more of the justices composing this court with such signature, but we are not in a position to conclude that the paper thus seeming to be signed by the proper judge was ever filed or ever became a part of the record, or is in the condition it was in when signed, unless the same is authenticated by the officer whose duty it is to file and preserve the same." Moyer vs. Preston, 44 Pacific Reporter, 850.

But it may be claimed that all the papers involved in this motion were properly endorsed by the clerk of the court below and that he omitted to copy (or have copied) the endorsements into the transcript of the record which was sent up. And in this connection it may be said that he will be presumed to have done his duty.

Our complete answer to this is, that if he properly endorsed those papers, "it doth not appear" in the transcript and it certainly ought so to appear, and the presumption as to official duty, is, to use a common expression, "as long as it is broad," and would cover his duty to incorporate the endorsements into the transcript as well as his duty to make them. Most of the other papers in the cause were properly and regularly filed and we find those file marks in the duly certified transcript as a part of it. Would the clerk in copying or comparing for certification have copied and certified the file marks upon some, and omitted to copy or certify the same if there were any upon others? "A question not to be asked." No; the truth and the fact is that the clerk of the court below was not requested to file these papers before the transcript was made and sent up. We had the records of the lower court searched after the transcript came here and there was no file mark on them then, nor were they entered in the register as "filed." The clerk has no authority to change the file mark on papers filed by him.

Warner vs. T. & P. R. Co., 54 Fed., (C. C. A) 920, 921, and, of course, no authority to file papers which he is not ordered or requested to file. Even if the clerk of the court below could, by a *nunc pro tunc* order of court file all the other papers which counsel have neglected to have filed, which, under the authority of the Credit Co. vs. R. Co. *supra*, we most emphatically deny; yet, this procedure could not apply or be applied to the original citation and writ of error which came up with the transcript and are beyond the control of the clerk of the lower court or even of the lower court itself. These, at least, are secure. We stand upon our record. The transcript of the record, like every record, and especially these original papers, imports verity.

What says the Supreme Court, Chief Justice Taney speaking for the court.

"Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record as certified and returned by the clerk of the Circuit Court can be received here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court." Hudgins vs. Kemp, 18 How. 530, 534.

The clerk is not to blame for not doing what he was not requested to do, nor for not doing, whether requested or not what it was counsel's duty to do. "The fact that the clerk of the Circuit court in preparing transcripts on appeal to this court, labored under a mistake as to the time within which the transcripts were required to be filed is not a valid excuse for failure to file them within the time prescribed by the established rules. Richardson vs. Green, 136 U. S., 104 (9 S. C. R. 443). And this court cannot in support of its jurisdiction rely upon any recital in the petition for writ, order allowing writ, or even in the clerk's certificate, if such

recital is unsupported by the original writ. The clerk cannot make a record of what is not a record. That any matters are certified by the clerk does not make them part of the record Reed vs. Marsh, 13 Pet. 153; Fisher vs. Crockrell, 5 Pet., 248, 254. And if the clerk cannot by certifying it make that of record which is not, certainly counsel cannot patch up a record by recitals in draft orders, bonds or other papers. A recital is a citation, even, that an allowance of an appeal was obtained at a certain time, does not prove the fact. Edmondson vs. Bloomshire, 7 Wall 306, 313. So in Sage vs. R. Co., 6 Otto, 712-16, the Supreme Court says: "It is true that the bond accepted in this case, recites an allowance of an appeal in open court, *but this is mere surplusage, etc.*" "The return of process contained in the record on appeal must control, etc., *no presumption can be indulged that there was some other and different service of process* made from that which appears in the record." Lonkey vs. Keys S. M. Co., S. C of Nevada, and cases cited (17 L. R. A. 351). Presumptions cannot controvert facts and there are no presumptions in favor of the jurisdiction of the United States courts. "An unnecessary statement in the Marshal's return is not conclusive of the court's jurisdiction." The Lindrup, 70 Fed. 718.

The fact that neither clerk nor counsel deemed it necessary to file certain papers, or KNEW HOW *to file them properly*, would be no excuse for their not being properly filed.

In the State of Florida the C. H. Phosphate Company, 70 Fed. (C. C. A.) 883, 885, already cited, the court says:

"It is claimed that this failure to file the order of enlargement was a neglect of the clerk of the lower court for which the appellant is not responsible. We cannot assent to this. * * * It was not the business of the clerk of the Circuit

Court, to obtain such an order, file it in his office, or transmit i to the Court, but it was the duty of the appellant not only to procure the order, but to see to the proper lodgement of the same."

See also Warner vs. T. &. P. R. Co., 54 Fed. 920, already cited.

"It is no part of the clerk's duty as clerk to procure the allowance of writs of error and the appoval of bonds for appeals for writs of error. This is the office of parties, or of their attorneys and solicitors. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary endosement on the writ of error. He relied on the clerk to do for him what the clerk was under no official obligation to do. He complained with no very good grace of the manner in which the clerk performed a purely voluntary service for his accomodation and at his request, etc."

In the case at bar there does not appear to have been any such request, even made of the clerk.

II.

THE CIRCUIT COURT OF APPEALS COMMITTED NO ERROR IN DISMISSING THE WRIT OF ERROR, AS THERE WAS NO EVIDENCE THAT THE WRIT HAD BEEN FILED.

It is admitted by the attorneys for defendant in error that writ of error must be filed or lodged with the court wherein the case was tried.

Then the only question open for discussion is: Was there evidence of such filing in the record before the circuit court of appeals? We say there was none.

The law provides that the original writ of error shall be annexed to the record and returned to the circuit court of appeals. It is admitted that writ of error had nothing upon it to show that it had been filed in the lower court

It is also admitted by plaintiff in error that the indorsement of the filing of the writ on such writ would be the best evidence. This is wholly wanting. What other evidence is there that it was ever filed or even lodged with the lower court? We say, none.

Plaintiff in error claims that the filing of the writ is shown in the following ways:

1 The original writ was attached to the record that was transmitted to the circuit court of appeals, and the fact that it was so transmitted is evidence that it was filed by the parties in the lower court. Judge Gilbert in his dissenting opinion laid much stress on this fact.

We strenuously urge that this is not evidence of such a fact. There might be something in the contention if the writ had the signature of Mr. McKenney and the seal of this court, and had been allowed by one of the Justices of this Court, because in such a case it would have been necessary for some party (and it might be presumed to be the plaintiff in error) had taken the writ from this city to Seattle and lodged or filed it with the clerk of the lower court at Seattle. But it was signed by the same clerk who transmitted it to the circuit court of appeals. He surely had it in his posession when he signed the writ. It was in his possession when the lower court allowed it.

It will not be contended that up to this point the writ was filed although it was in exactly the condition in which it was forwarded to the circuit court of appeals. No one will contend that if forwarded in that condition and prior to the delivery of the same to the attorneys and the filing of the same by them, the appellate court would have acquired jurisdiction, because the one essential thing was wanting,

viz. the filing and even the lodging of the writ by the attorneys after the same had been issued. Yet, as we have said it was in the same condition when forwarded to the circuit court of appeals as it was when issued by the clerk and remained in his hands ready for delivery.

The only presumption that can be indulged in (and we doubt even this) is that at some time after the writ was issued it was in the hands of the clerk of the lower court; but we have shown that it was in his hands when issued. At that moment it was ready for delivery to the attorneys for the plaintiff in error to be filed by them; and when filed, jurisdiction would attach. No other party than the plaintiff in error could file this writ. And if that was neglected by it the jurisdiction of the appellate court would never att ch. It has been held frequently by this court that where the record showed the issuance of the writ during the time within which the writ might be sued out, yet if the parties neglected to file it within the statutory time, jurisdiction would never attach. The following authorities show this to be the well established practice in this court.

In the Credit Company vs. Railway Company 128 U. S. 258, record on appeal shows that the petition for appeal, the allowance, citatation and bond were *endorsed filed by the clerk of the court five days after* the time within which an appeal could be taken had expired, and the appeal was accordingly dismissed, although argued and submitted to the appellate court upon its merits without objection or making a motion to dismiss and so far as the delay of five days could be waived by the parties, it was waived, and although an attempt was made to cure this defect of jurisdiction by an order of court *nunc pro tunc*. As to which last effort the court says:

"When the time for taking an appeal" (or suing out a

writ of error, see R. S. section 1012, and even the former portion of this same decision) "has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken" (or a writ of error sued out) "would be a dead letter. The appeal must be dismissed."

In the case of Farrar vs. Churchill, 137 U. S. 609, a final decree was rendered November 5, 1885. On October 31 1887, certain defendants presented a petition for a cross-appeal to a justice of the Supreme Court and obtained an allowance thereof, an appeal bond being approved and a citation issued on that day. This petition was filed in the circuit court on the 7th day of November, 1887. By an endorsement upon the citation service of the same was accepted and an appearance of appelle entered on the 5th day of November, 1887. And yet, the Supreme Court dismissed the crossappeals.

"Crossappeals must be prosecuted like other appeals. * * * And so when a crossappeal is allowed by a justice of this court, the petition and order of allowance must be filed in the court below, in order to the due taking of the crossappeal under the statute. As in this case the petition, order and bond *were not filed in the Circuit Court* until after two years had elapsed from the entry of the decree the crossappeal must be dismissed."

So we claim that the only legitimate presumption that may be indulged in from the fact that the writ accompanied the record to the circuit court of appeals is that the writ was issued by the clerk of the lower court. The whole record bears out this presumption and this alone.

If we examine the law register it will be observed that every other paper was marked filed and a charge made for the filing of the same. It will be observed on page 435 that the law register of the lower court recites merely the issuance of the writ and the citation, not that they were filed. See record, page 435.

It also shows that no charge was made for filing the same although charges were made for the filing of all other papers. The original writ and citation bear no file marks upon them. All other papers filed in the cause are properly marked filed. So if any presumption may be drawn at all it is that the writ of error was never filed by the lower court, but merely issued by it and transmitted without filing. Again it is a presumption that applies in all court procedure that the clerk as well as all other officers of the court will do his duty. It was the clerk's duty if the writ was filed by him, to mark it so, and preserve evidence of this fact in the record.

The plaintiff in error further contends that the affidavit of the clerk of the lower court, the recital in the citation in the writ had been filed, and also the returns of the clerk that the fees for the transcribing the record had been paid are all evidence of the fact that writ had been filed.

If the record before the circuit court of appeals was incomplete (and it is admitted by counsel that it was, in not affirmatively showing the filing of the writ), there was one way, and one way only, to supply the omission, and that was by suggesting a diminution of the record and applying for a writ of certiorari to complete it. By obtaining a proper return to such writ, such omitted facts would then become a part of the record.

It would be a strange, yes, dangerous, rule that would allow parties to supply records by affidavits. Take this case, for example. The matter of the dismissal came on for hearing on the 4th day of May, 1896. On that day, without any notice to defendant in error, petitioner filed the affidavit of Mr. Hopkins, the clerk; Mr. Strudwick, one of the attorneys of record, and Mr. Quilter, deputy marshal, to com-

plete and supply facts not otherwise appearing of record. (See Record, pp. 414, 418, and 420.) It is not by the record proper, but upon the affidavits of these parties, especially that of Mr. Hopkins, that the petitioner relied to show that the writ of error was in fact filed. To state these facts is really all the argument needed to show that such extraneous matter must be disregarded.

If one fact can be supplied in such a manner, then any other matter can be brought into the record in the same way. Supposing a party neglected to show the necessary jurisdictional fact of diversity of citizenship, could such party supply it in the appellate court by affidavit?

Again supposing the record failed to show that a judgment had been entered against plaintiff in error, or the record failed to show proper exceptions had been taken to alledged errors in the charge on which plaintiff in error was relying for reversal could these be supplied by affidavits? The only way to bring such matters into the record would be to suggest a diminution of the record, obtain a writ of certiorari, and in that manner bring any ommitted part of the record of the lower court into the record of the appellate court.

We are not without authority on this proposition. The same thing has been attempted before in this Court, and such matters not properly in the record have always been disregarded. On this question Chief Justice Taney, speaking for the Court, says:

"Upon a motion to dismiss, as well as on the hearing on the merits, no evidence dehors the record as certified and returned by the clerk of the circuit court can be received here to impeach its verity or to show that the certificate ought not to have been given. The case as therein set forth is the case before this court." (Hudgins vs. Kemp, 18 How., 530, 534.)

"The clerk is not to blame for not doing what he was not requested to do, nor for not doing, whether requested or not, what it was counsel's duty to do.

" 'The fact that the clerk of the circuit court in preparing transcripts on appeal to this Court labored under a mistake as to the time within which the transcripts were required to be filed is not a valid excuse for a failure to file them within the time prescribed by the established rules.' " (Richardson vs. Green, 130 U. S., 104; 9 S. C. R., 443.)

"And this Court cannot in support of its jurisdiction rely upon any recital in the petition for writ, order allowing writ, or even in the clerk's certificate, if such recital is unsupported by the original writ. The clerk cannot make a record of what is not a record. That any matters are certified by the clerk does not make them part of the record. (Reed vs. Marsh, 13 Pet., 153; Fisher vs. Cockrell, 5 Pet., 248, 254), and if the clerk cannot by certifying it make that of record which is not, certainly counsel cannot patch up a record by recitals in draft orders, bonds, or other papers. A recital in a citation, even that an allowance of an appeal was obtained at a certain time, does not prove the fact. (Edmonson vs., Bloomshire, 7 Wall., 306, 313.)

"So in Sage vs. R. Co., 6 Otto, 712–'16, the Supreme Court says:

" 'It is true that the bond accepted in this case recites an allowance of an appeal in open court, but this is mere surplusage, etc.' "The return of process contained in the record on appeal must control, etc. No presumption can be indulged that there was some other and different service of process made from that which appears in the record.' (Lonkey vs. Keys S. M. Co., S. C. of Nevada, and cases cited, 17 L. R. A., 351.)

"Presumption cannot controvert facts, and there are no presumptions in favor of the jurisdiction of the United States courts.

" 'An unnecessary statement in the marshal's return is not conclusive of the court's jurisdiction.' "

The Lindthrup, 70 Fed., 718.

All the rules of appeal sustain our position and the above

authorities. We will cite the text in the American and English Encyclopaedia of Pleading and Practice on several propositions which clearly state the rules, and they are so well recognized that they need no citation of authorities to support them, but the authorities are cited under each which fully support the rules.

"Duty of Appellant in Making Transcript—(1) In General. As the appellee cannot transcribe the record, it is the duty of the appellant to cause the transcript to be made and filed. He must see that it is correct, complete, properly arranged as the rules of the court require, and properly authenticated. Were guilty of laches in its examination, he cannot plead surprise or inadvertance as an excuse in the appellate court."

American and English Encyclopaedia of Pleading and Practice, Vol. 3, page 292—3, and cases cited.

"Impeachment of Record — The Record Imports Verity. A properly authenticated transcript of the proceedings in the trial court imports absolute verity, and cannot be contradicted by affidavits nor in any other manner. As all appeals are based on trial court records, the parties in appeal are conclusively bound thereby. The appellate court cannot, therefore, look beyond the record for grounds upon which to determine the case."

Ibid. pp. 296—7

"Evidence Dehors the Record. — New or extrinsic evidence will not generally be received on appeal to add to or detract from the transcript, either at law or in equity. Additions or omissions therein cannot be expunged or supplied by an affidavit of a party, or his counsel, or by statements in the brief or argument."

Ibid. p. 298, and cases cited.

"Amendments of Record. — (1) Of Original Record.— Where the transcript on appeal is filed it passes into the sole jurisdiction of the appellate court. But the original record of which the transcript is a copy remains in the jurisdiction of the trial court. The appellate court has accordingly no power to amend the original record. But all corrections therein must be first made by an appropriate proceeding in the trial court, and afterwards brought up before the appellate court by certiorari."

Ibid. pp. 301—2, and cases cited.

Amendment of Record.—But the original records are not removed by an appeal. And the trial court retains jurisdiction to so amend them as to express the actual events during the trial of the cause, even after an appeal has been taken from a final judgment therein.

Ibid. p. 331, and cases cited.

"Lost Papers.—Lost records in the cause cannot be supplied in the appellate court by sworn copy, or by affidavits. An appropriate proceeding must be taken in the trial court to prove and substitute copies of such lost papers. They can be made part of the original transcript by order of the appellate court alone."

Ibid. pp. 303 - 4, and cases cited.

"Omissions.—Portions of the record involving no questions should be ommitted; but every record matter essential to a full understanding and proper decision of the case must be shown in substance fairly and intelligibly by the abstract."

Ibid p. 314, and cases cited.

Certificates.—The certificate of the clerk below, or a certificate or an affidavit of the judge, cannot be considered in contradiction, amendment, or addition to the contract."

Ibid. p. 316, and cases cited.

"By Affiadvit.—A return of record cannot be impeached by affidavits of a party, counsel, or the trial court clerk."

Ibid. p. 300, and cases cited.

It is also too well settled to need citation of authorities that all jurisdictional facts must appear affirmatively of record. They cannot be supplied by inference or presumption.

It is also true that a court will not indulge in a presumption of any character in regard to any record in the lower court which does not affirmatively appear in the transcript or record. For instance a court will not presume that a judgment was entered either for or against appellant. It will not presume the verdict of a jury was returned either in favor of or against the appellant.

As we have suggested above, a writ of certiorari was the only way to complete the record in the circuit court of appeals

or bring into the record the omitted evidence if any of the filing of the writ. This the attorneys for appellants must do at the first term of court after the entry of case in accordance with rule 14 of the Supreme Court of the United States, and also by rule 18 of the Circuit Court of Appeals for the ninth circuit, which rule is identical with rule 14 of the Supreme Court. This the plaintiff in error wholly failed to do, but on the contrary submitted his case on the record and the case was decided as submitted by him so that he has effectually waived his right to obtain a writ of certiorari to complete the record, it is now nearly two years since the motion was made by defendant in error and attention called to the defect in the record. It is the rule in all courts so far as we are familiar with them, and has always been, that the appellant must move promptly for a writ of cetiorari for a completion of the record or he will be held to have waived his right to such a writ.

This being the well established practice, it comes with very poor grace on the part of petitioner to complain of the clerk in not giving plaintiff in error a perfect record. It had it within its power and it was the duty of the attorneys to get a perfect record if one existed. It has no one to blame but itself if it failed in getting the whole of the record before the appellate court. The very fact that the clerk was willing to make affidavits, etc. (a purely voluntary act, wholly outside of his official duties), to be used for the purpose of supplying defective records, shows he was not in any sense acting in bad faith or refusing to give plaintiff in error such records as it desired.

In the State of Florida the C. H. Phosphate Company, 70 Fed. (C. C. A.), 883, 885, the Court uses language quite appropriate for this case, wherein it says:

"It is claimed that this failure to file the order of enlargement was neglect of the clerk of the lower court, for which the appellant is not responsible. We cannot assent to this * * * It was not the business of the clerk of the

circuit court to obtain such an order, file it in his office, or transmit it to the court, but it was the duty of the appellant not only to procure the order, but to see to the proper lodgment of the same."

See also Warner vs. T. & P. R. Co. (54 Fed., 920):

"It is no part of the clerk's duty as clerk to procure the allowance of writs of error and the approval of bonds for appeals of writs of error. This is the office of parties of their attorneys and solicitors. * * * In this case the plaintiff in error did not use reasonable diligence to get his bond approved in time and to obtain the customary indorsement on the writ of error. He relied on the clerk to do for him what the clerk was under no official obligation to do."

III.

EVEN IF THE AFFIDAVITS ABOVE MENTIONED COULD BE CONSIDERED A PART OF THE RECORD, THEY DO NOT SHOW THAT THE WRIT WAS FILED.

Even if the affidavits above referred to are considered a part of the record, yet considering the record together with the affidavits they fail to show the filing of the writ, but on the contrary affirmatively show that the writ was not filed.

On this proposition we simply refer this Court to the well considered decision of the circuit court of appeals, found on pages 432—446 of the record.

IV.

IF THE COURT SHOULD BE OF THE OPINION THAT THERE WAS EVIDENCE OF THE FILING OF THE WRIT, YET THERE IS NO EVIDENCE SHOWING WHEN IT WAS FILED, OR ESPECIALLY THAT IT WAS FILED PRIOR TO THE ISSUANCE OF THE CITATION. IF FILED SUBSEQUENT TO THE ISSUANCE OF THE CITATION THEN THE CITATION IS OF NO EFFECT OR FORCE, AND THE CASE WAS PROPERLY DISMISSED.

It must be conceded that a citation issued and served prior to the issuance and filing of a writ of error is a nul-

lity. So, if the writ of error in this case was filed after the issuance and service of the citation (and surely there is no record showing that it was filed before) such citation was useless and void and could be disregarded as it was by the defendant in error appearing especially, as she did, and moving to dismiss.

Before filing the motion counsel for defendant in error examined the record both in the lower court and circuit court of appeals to see if the writ of errror had been filed. He found no record of such writ having been filed, and everything in the record indicated that none had ever been filed, much less did the date of filing appear. Said search clearly proved to the defendant in error that the citation was improperly issued. So if this court should be of the opinion that the fact of the original writ of error was returned to the circuit court of appeals was some evidence that the writ of error had previously been filed with the clerk of the lower court, yet there is nothing in the record to show the date of the filing or even the lodgment of such writ. Nor can there be any presumption that it was filed or lodged prior to the date the record was transmitted by the clerk of the lower court to the circuit court of appeals. So that neither the circuit court of appeals nor this court can say that the citation was not issued prematurely; and, if issued prematurely, then it was a right that the defendant in error had to have the writ dismissed on the ground set forth in the motion "that no proper legal citation on said writ of error was issued or served." True it is contended that the affidavit of the clerk shows this fact, but we have already shown that the affidavit of the clerk cannot be considered as a part of the record in the case.

Brief on the Merits.

The defendant in error not waiving its motion heretofore made to dismiss this cause for want of jurisdiction, but on the contrary maintaining that her motion should prevail, files and submits this her brief upon the merits.

STATEMENT OF THE CASE.

Defendant in error will make the argument in its brief on the theory that appellant will make the same statements and arguments made in its brief before the circuit court of appeals We do this because plaintiff in error has not seen fit to give us a copy of its brief in this court.

We desire to make a few corrections of the statement made by plaintiff in error. There is absolutely no proof that the general agent in San Francisco sent any notice to Mr. Phinney. The agent says he thinks he sent him a notice. There is no claim that the notice provided by statute was mailed. The company in open court stated to both counsel and court that it did not allege the service of either the statutory notice or any other notice, and was not claiming and

would not claim the benefit of having served any notice. Record p. 190-2. The evidence of notice came out in the testimony of Mr. Stinson when plaintiff in error was offering evidence under the allegations of its pleadings that the policy had been recinded and surrendered. As the plaintiff in error had agreed in open court never to claim the benefit of having served any notice the evidence was rendered were objectionable. It is true that Mr. Stinson testified that about ten days before the premium became due Mr. Phinney called at his office to arrange for the payment of the premium, and asked Mr. Stinson to take his 60 or 90 day note. But Mr. Stinson in almost the same breath testified to other facts of considerable importance in connection therewith that plaintiff in error overlooked in its statement. He destified that, after he claimed the premium was due, and prior to the time Mr. Phinney tendered the premium he had several conversations (on cross examination so many he could not remember the number. Record p. 267.) with Mr. Phinney, each time Mr. Phinney endeavoring to get him to take his note for the second year's premium, each time he telling Mr. Phinney to get the money. Finally about 30 days after it was due and after a number of like conversations Mr. Phinney obtained the money and tendered the premium and the agent declined to receive it on the ground that Mr. Phinney was in ill health. No evidence was offered to show that during this interim Mr. Phinney's health had become impaired. The statement made by counsel by plaintiff in error that Mr. Phinney said he could not pay the premium, and that he made no tender of the premium is unwarranted by their evidence. The following are two letters written at the time this transaction occurred:

"SEATTLE, Washington, Nov. 26, 1891.

"*A. B. Forbes, Esq., Gen'l Agt.*

"DEAR SIR: In compliance with your request, I regret having to return the undernoted renewal receipts.

"September.

"51342 Janey * * *

"422198 Phinney. (Offered to pay but in ill health)

"Several of the above, also quite a number of those previously sent, will be reinstated. Those not included (if receipt asked for) will be reported in next acct.

"Yours very truly,

"F. L. STINSON."

"SEATTLE, Washington, Dec. 10, 1891.

"*A B. Forbes, Esq., Gen'l Agt.*,

"DEAR SIR: Your wire of the 9th inst. reading. 'If tendered decline acceptance September premium, No. 422, 198, Phinney,' duly received. "This premium was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk.

"Yours very truly,

"F. L. STINSON."

Record 187 and 188.

The agent says, "It was tendered and I refused it" These are the words of an active business man, made at the time the transaction occurred. That the company, at the time of the trial, (after Mr. Phiney was dead and gone), should undertake to show by this same party that there was no legal tender, does not militate against the record made at the time. It is quite apparent that at the time he considered it a good tender.

There is an attempt to show that Mrs. Phinney, the executrix, considered and treated the policy as forfeited.

The evidence does not bear this assertion out. At the time of the death of Mr. Phinney, Mrs. Phinney was taken seriously ill, and for nine months her life was despaired of by her friends. All matters in connection with her estate was left to her agents and attorney. This policy was not among the papers found among Mr. Phinney's effects. Mrs. Phinney told her attorney, Mr. Burleigh, that there was another policy of $100,000, but the policy was not found, and the matter remained in that condition until she was able to attend to business nine months later. As soon as she was able to attend to her trust the matter was at once taken up and prosecuted. Her evidence is as follows:

"Q. You say that Mr. Phinney never told you this policy was forfeited? A. No.

"Q. Did he ever tell you it was alive? A. Yes.

"Q. How many times did he tell you it was alive?

"A. I could not tell you just how many times, but a number of times.

"Q. How long prior to his death did he mention this policy as being one of his policies of insurance that was in force? A. Not more than two weeks.

"Q. Did he give you any directions as to the use of the insurance you should collect? A. Yes, sir.

"Q. Mention this policy among them? A. Yes, sir.

"Q. You say you did have several conversations with Mr. Burleigh about this?

"A. Well, I don't know, several. I know I have talked with Mr. Burleigh.

"Q. Did you talk to others about it? A. No.

"Q State the condition of your health, Mrs. Phinney, immediately after the death of your husband. * * *

"A. The first year after Mr. Phinney's death I was seriously ill.

"Q. Were you able to attend to business at all during that time? No, I was not.

"Q. These policies were collected by your agent, were they not? A. Yes, sir.

"Q. The business matters were all turned over to other parties? A. All done through other parties.

"Q. Who prepared this letter, Mrs. Phinney, that you mailed to New York?

"Objected to by counsel for defendant as immaterial.

"Objection sustained."

Record, page 237.

The mere fact that Mr. Burleigh prepared a petition stating that the personal property was only $50,000.00, before he had found the large policy, before he knew whether the policy was payable to Mrs. Phinney or the estate, and before he had been able to ascertain the facts in the case does not militate against her evidence in the least. Nor does the fact that a letter by another agent stating that she was unaware of the existence of the policy, which in her condition she signed. The fact remains that as soon as she was able in the least to attend to business this claim was made and enforced.

There was much evidence going to show that the statement made by Mr. Phinney in life that he had paid the premiums in advance, part in money and part in property, was true. As above noticed he spoke to Mrs. Phinney of this policy a few weeks before he died as one of the policies in force. The soliciting agent testified as to the payment of the first premium. He rebated 40 per cent. of $3770.

For the balance he took part cash, part in property, and something over $800 in notes running from sixty days to nine months at a small rate of interest. This fully accounts for the first year's premium entirely outside of what we will now relate. About the time this application was made two mortgages of this soliciting agent were coming due on which the soliciting agent still owed Mr. Phinney over $3400. According to plaintiff in error's amended answer, par. II, p. 33, record, the policy was delivered Nov. I, 1890. On this very day both of these mortgages were satisfied in full by Mr. Phinney in favor of the agent. They had been due for about a month, (and we claim was awaiting the return of the policy) and was satisfied the same day the agent delivered the policy, and as a part consideration of the second year's advance premiums on the policy. The soliciting agent on the stand says he paid the mortgages in cash. He also says he rebated to Mr. Phinney his commission. It would be a strange business transaction for this agent to take Mr. Phinney's notes for $800.00 running from sixty days to nine months, take in further payment outside real estate of little value and at the same time he pay Mr. Phinney over $3,400 in cash, and further be compelled at once to pay the company the $800, which Mr. Phinney's notes represented, as well as the value of the property, amounting to something like $1,000. We claim and believe that the satisfaction of these two $3.400 mortgages were in payment of the second premium. The same soliciting agent told Mr. Jones the smaller one was in payment of a premium. Record, p. 306–7. We are indebted to our adversaries for what evidence was brought out in this line, (the declaration of Mr. Phinney,) as none of it was competent until they opened the door. We did undertake to show another fact which plaintiff in error very strenuously objected to, and the objection

was sustained, and that was that agent was very heavily indebted to the company for premiums received and for which he never accounted to the company. Record p. 279. We do not claim that the company other than its agents received the premium. We believe fully that the agent returned to the company the second year's receipt unpaid, and always led it to believe but one year's premium was paid. There being no direct relation between Mr. Phinney and the company it would be an easy matter to mislead both.

The lower court took the view that no sufficient evidence of the second year's premium was offered. And we only offer the above in support of Mrs Phinney's evidence that Mr. Phinney told her the policy was alive and that both Mr. and Mrs. Phinney so regarded it. In our discussion of this case we will discuss it on the theory that but one year's premium was paid. We need nothing better to support our case.

ARGUMENT.

PART I.

Specifications of Errors, I, II, III, IV, V, VII, XXII. XVIII and XXVI.

THE STATUTE OF NEW YORK WAS A PART OF MR. PHINNEY'S CONTRACT OF INSURANCE.

Plaintiff in Errors specification of errors 1, 2, 3, 4, 5, 7, 22, 23 and 26 are based upon the refusal of the Court to give several instructions to the effect that the statute of New York was not a part of the contract of insurance on Mr. Phinney's life. We contend that this is the only question of merit on this appeal. When this question is answered the rights of the parties on this appeal are fully deter-

mined. Defendant in error maintains this question must be answered in the affirmative for these reasons:

1. Contract was to be wholly performed in New York, hence New York was the place of contract.

2. The legislature of New York intended to deprive all insurance companies chartered by the State of New York of the power to forfeit policies of insurance except in the manner pointed out by the statute, no matter whether the contract was made outside or inside the State of New York. This intention is shown in two ways:—

a. The Court of Appeals of New York has decided that such was the meaning of the act.

b. The language of the act in the light of all the rules of law governing the powers of corporations is susceptible of no other construction.

The contract was to be performed in New York hence New York was the place of contract.

The application for the policy of insurance was made to the company at its home office in New York. The policy was issued in New York upon the receipt of the premium, of which it acknowledges the receipt; the premiums were all payable in New York. The proofs of death were to be delivered at the Home Office of the company in the city of New York. The policy when it matured was payable in the City of New York. The policy was to be forfeited if at all by the non-payment of a premium at the home office in New York. In other words New York was the place of performance in every particular. If any default occcured, it occurred in New York. If the policy was ever forfeited it was forfeited in New York. This shows clearly that the parties intended that the laws of New York should govern

as to the liabilities of the parties and be the place of contract. Especially is this true of defendant in error. It prepared the policy, all these provisions were in the printed form of the policy. Again a clause in the printed form of the policy expressly waived the requirements of the service of the statutory, notice. What statute did it refer to if not this New York statute. It could not refer to one in Washington because there was none to waive.

The provision relative to waiving service of the statutory notice could only refer to the statute of New York This statute must have been considered applicable otherwise what purpose could the company have had in inserting a waiver in the policy. If we stop to consider that this policy was prepared by the company, and we may presume by those skilled in the law relative to such contract it is impossible to come to any other conclusion that it was intended to bring the policy within the protection of the New York laws, and have its liability measured by such laws, at least it used language most appropriate to express such intent, and exclude every other legal construction. It cannot complain if the court so interpret the contract which it prepared presumably in its own interest.

On the foregoing facts we think the law is well settled, and we will content ourselves by quoting alone from authorities.

This proposition was argued at length by both parties in the court below on the assurance by both parties to the Court that it was the controlling proposition in the case. After a careful consideration of the question, the presiding Judge, the Hon. C. H. Hanford, rendered a very full and able opinion which is published in full in the 67 Fed. Rep. p. 493.

The decision of Judge Hanford above referred to as the place of contract, is fully sustained in a very recent decision of this court in the case London Assurance v. Companhia De Moagens De Barreiro. In this case there was not nearly so much in the contract to show the intent of the parties as to the place of the contract as there is in the one we are now presenting

"Under the circumstances, we think that this contract of insurance is to be interpreted according to the English law. The appellant is an English Company. It made the contract in Philadelphia, by its agents, and that contract, by its terms, was to be performed in England. The parties to it understood and agreed that, in case of loss or damage to the interest insured under the certificate, the same was to be reported to the corporation at London, and be paid in sterling at its office in the Royal Exchange in the city of London, and the claims were to be adjusted according to the usages of Loyds, but subject to the conditions of the policy and the contract of insurance.

"Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation."

Mr. Justice Peckham after reviewing other cases sustaining the doctrine announced, closes the opinion relative to this feature of the case in the following language.

"This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. See Liverpool & G. W. Steam Co. V. Phoenix Ins. Co., 129 U. S. 397, 446, 453, 9 Sup. Ct. 469."

London Assurance v. Compahia de Moagens De Barreire. 167 U. S. 149.

Mr. Justice Harlan in a case reported in the 142 U. S., uses this language:

"We have seen that the bonds in suit we e redeemable

on the first day of January. 1866, and not before without the consent of the holder, and were payable in pounds sterling with interest at the rate of five per cent. per annum from date, the interest to be paid semi-annually on named days, on presenting the proper coupons for the same at the house or Palmer, Mackillop, Dent & Co., London, where the principal will also be redeemed on the surrender of this certificate.' The contract, therefore, was one in which all parts was to be performed in England. Nevertheless, it is contended that the principal sum agreed to be paid should bear interest at the rate of seven per cent.; fixed by the laws of South Carolina. The only basis for this contention is the mere fact that the bonds purport to have been made in that State. But that fact is not conclusive. All the terms of the contract must be examined, in connection with the attendant circumstances, to ascertain what law was in view of the parties when the contract was executed. For as said by Chief Justice Marshall in Wayman vs. Southard, 10 Wheat., I on P. 48 it is a principle universally recognized, that in every forum a contract is governed by the law with a view to which it was made.' And by Lord Mansfield in Robinson vs. Bland, 2 Burrow, 1077, 1078, 'the parties had a view to the laws of England. The law of the place can never be the rule when the transaction is entered into with an express view to the law of another country as a rule by which it is to be governed. Now here the payment is to be in England; it is in English security, and so intended by the parties.'

Refering to these and many other cases, this Court, speaking by Mr. Justice Matthews, held, upon full consideration, in Pritchard vs. Norton, 106 U. S., 124, 136, that the law upon which the nature, interpretation and validity of a contract depended, was that which the parties, either expressly or presumptively incorporated into it as constituting its obligations. This doctrine was reaffirmed in Liverpool, etc., Steam Co. vs. Phoenix Ins. Co., 129 U. S., 397, 458, where it was said that, according to the great preponderance if not the uniform concurrence of authority, the general rule was, 'that the nature of the obligation and the interpretation of the contract are to be governed by the law of the place where

it is made, unless the parties at time of m king it have some other law in view."

Coghlan vs. Sovth Carliona Raliroad Co., 142 U. S., p. 101 on p. 109.

In another case the Supreme Court of the United States was called upon to pass upon the above question of law on a state of facts almost identical with the facts of this case. Mr. and Mrs. Hume were living in the City of Washington, District of Columbia, when they made application to the Connecticut Insurance Company of Hartford, Conn., for a policy of insurance and the question came squarely before the Court whether the law of Connecticut or the laws of the District of Columbia should prevail in governing the rights between Mrs. Hume, the beneficiary, and the creditors of the deceased husband. The Court in part says.

"The rights and benefits given by the laws of Connecticut in this regard are as much a part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place."

"And if this be so as between Hume and the Connecticut companies, then he could not have, at any time, disposed of these policies without the consent of the beneficiary nor is there anything to the contrary in the statutes or general public policy of the District of Columbia."

Washington Central Bank vs. Hume, 128 U. S., 195 on pages 197 and 206.

The Supreme Court of the State of Washington described this point in cases where this plaintiff in error was one of the parties to the suit. In those cases, as in this, this plaintiff in error made the same contention as it now makes in this Court. In one case they contended that the contract was a Pennsylvania contract, in the other, that it was an Ohio con-

tract. In the first case the clause "stipulating that the contract was to be construed according to the laws of New York" was in the printed part of the policy, in the other it was in the application. In the case which the company claimed that the policy was an Ohio contract, the provision was the same as in this case verbatim, and likewise was in the application. The same blank prined form was used in the latter case as in this, and exactly the same argument was urged. In deciding the question the Supreme Court uses the following language:

"From which it clearly appears that it was the intent of the parties to locate the place of its execution in the State of New York. Especially does this appear to have been the intention of the defendant. The provision above quoted appears as part of the printed form of the policy issued by the company. It could have been inserted therein only after full consideration, and its insertion could have had but one object, and that was to bring the policy as fully within the laws of the State of New York as though it had been actually executed and delivered therein. This was done for the benefit of the company, and it must abide the results flowing therefrom. In our opinion sufficient appears upon the face of the policy to require us to construe it as though it had been actually executed and delivered in the State of New York. It must follow that the statute in question must be given force in determining rights founded thereon."

Griesmer vs. The Mutual Life Ins. Co. 10 Wash. p. 202 on p. 208.

At the same time the Supreme Court of Washington handed down another decision as follows:

"The only substantial difference between this case and No. 1507, just decided, (the above case,) is that the clause set out and construed in that case was not in the policy upon which the action was brought There was, however, in the application upon which it was issued a provision that, 'This application is made to the Mutual Life Insurance Company of New York, subject to the charter of the company and

the laws of the State of New York.'" (Just the same language as that contained in Mr. Phinney's policy); "and, in our opinion, this was sufficient to locate the contract in in that state, and require that rights thereunder should be determined by its laws."

"Hence, for the reasons stated in the opinion in the foregoing case, the judgment rendered in this must be affirmed."

Ella W. Griesemer, admix. vs. Mutual Life Ins. Co., 10 Wash. 211 on p. 212.

The Supreme Court of Georgia has recently supported this view of the case. The syllabus is written by the Court and is as follows:

"Where, in a policy of insurance issued by an insurance company of the State of Massachusetts, it was stipulated as follows: 'No suit shall be brought under this contract, unless commenced within one year from the termination of the of the member to whom it is issued, it being an express condition hereof that all rights of action hereunder are limited to said period of one year. It is further expressly agreed that the place of contract is the home office of the association, in the City of Boston, and this contract will be governed by, and construed, only according to, the laws of the State of Massachusetts and where a law of the State of Massachusetts (Supp. Pub. St. Mass. 1882-88, p. 517, sec. 26), which was of force at the time the policy was issued, provided with reference to insurance companies of that state as follows: 'No such company shall make any stipulation in its insurance contracts concerning the Court or jurisdiction wherein any suit thereon may be brought, nor shall limit the time within which such suit may be commenced to less than two years after the cause of action accrues, and any such condition or stipulation shall be void,' held, that the stipulation in the policy limiting the time within which suit may be commenced thereon to one year from the termination of the life of the the member to whom it is issued is void, and suit may be brought thereon at any time within the period allowed by the statute of limitation."

Mass. Ben. Life Ass'n vs. Hale, 23 S. E. 849.

The California Supreme Court had the same question before it on exactly similar state of facts and held this same

statute of New York to be a part of contract of insurance issued by the New York Life Insurance Company upon a resident and citizen of the State of California. He made an application in California to a soliciting agent, as Mr. Phinney did in Seattle, both applications were forwarded to the General Agency at San Francisco, who forwarded the applications to New York, Both applications contained a like provision stating that the laws of New York should govern and control the contract. Both applications were accepted and policies issued in the State of New York. The policies were then forwarded to the general agencies of the respective companies at San Francisco, each from there forwarded their respective policies to their local agents, one in Seattle, the other in California, to be delivered on the payment of the first premium. In both cases the premiums were payable in New York, and the policies when matured, were payable at the Home Office in New York. Upon this state of facts the California Supreme Court held the contract to be a New York contract, and that the policy could not be forfeited except in the manner pointed out by the New York statute.

For a full statement of the facts it will be necssary to read the case as reported in both the Pacific Reporter and the California State Report.

Griffith vs. New York Ins. Co., 101 Cal. 627.

Griffith vs. New York Ins. Co., 36 Pac. 113.

We invite special attention to the whole of the opinion of the above case as it is exactly in point.

The Supreme Court of Iowa in a case decided but a few months ago, when this question was before it, used the following language:

"As we have said, it is argued that the policy in suit is a New York or Nebraska contract, and that there is no such law as that above set forth in either of these states. The policy was signed by the president and the secretary of the company, in the City of New York. The premium was made

payable there and the amount of the policy was to be paid, in the event of the death of the assured, at the City of New York. It was also expressly agreed that the policy should be construed to have been made in the State of New York. It was therefore a New York contract, and is to be governed by the laws of that state. Richards, Ins. 44."

Goodwin vs. Ins. Co. (Iowa,) 66 N. W. 157 on p. 160.

The Circuit Court of Appeals for the Sixth Circuit, in a very recent case in an opinion by Judge Taft, says:

"There can be no doubt that this policy is to be construed according to the law of Pennsylvania. It is expressly provided in the application, which is made part of the policy, that 'the place of contract shall be the city of Philadelphia, State of Pennsylvania.' In Weyman vs. Southard 10 Wheat. 1-48, Chief Justice Marshall stated it to be a principle of universal law that 'in every forum a contract is governed by the law with a view to which it is made.' See Pritchard vs. Norton 106 U. S. 124, 136, 1 Sup. Ct. 102, and cases there cited. In this case no necessity exists for presumption from the circumstances, because the intention of the parties is expressed."

Penn. Mutual Ins. Co. vs. Savings Bank, 72 Fed. 413 on p. 418.

In a recent case this question was in the Supreme Court of Texas. The provisions in the applications for policies in the case (which are identical with this) were that "this application is made to the Mutual Life Insurance Company of New York subject to the charter of the Company and laws of New York. The provisions in the policy were also identical, The court says. "We think the provisions of the New York Statute, under the facts as shown in this case, entered into and became a part of the contract between the parties."

Mullen v. Mutual Life Ins. Co. 34 Southwestern Reporter, 605.

The Supreme Court of Virginia, in a case decided last year in which the provisions of the policy were almost identical with those in the case at bar, sustains our view in this language:

"The policy of insurance provided that it was issued and

accepted upon the further conditions and agreements contained on the following pages which are made a part of this contract, and which contract shall be held and construed to have been made in the City of Cincinnati, Ohio. The contract of insurance having been made with reference to the laws of the State of Ohio, the plaintiff had a right to rely upon them in enforceing his contract so far as they related to its validity, nature, interpretation and effect. Bank v. Rickman, 16 Grat 126, 127; Corbin v. Bank, 87 Va. 665, 13 S. E. 98; 3 Minor Inst., 145; Story, Conf. Laws, sections 263, 280."

Union Central Life Insurance Co. v. Pollard. v26 Southeastern Reporter, 222.

The following authorities fully support our contention that as this contract was wholly to be performed in New York, New York was the place of contract, and the laws of New York entered into and became a part of the contract. Some of the cases have been already cited, but for the convenience of the court we will here collate them.

Phinney v. Insurance Co., 67 Federal Reporter, 493.

Insurance Co. v. Campanhia De Moagens, etc., 167 U. S. 149.

Coglan v. Railroad Co., 142 U. S. 101 at page 109.

Hall v. Cordell, 142 U. S. 116 at page 120.

Washington Bank v. Hume, 128 U. S. 206.

Pritchard v. Norton, 106 U. S. 124 at page 136-141.

Scudder v. Bank, 91 U, S. 406.

Scotland Co. v. Hill, 132 U. S. 107.

Steamship Co. v Phoenix Insurance Co., 129 U. S. 397.9

Penn Insurance Co., v. Bank, 19 C. C. A., 286 on page 21.

Nixon v. Insurance Co., 81 Federal Reporter, (C. C. A.) 79-9

Miller v. Tiffany, 1 Wall. 298 at page 310.

Hyde v. Goodnow, 3 N. Y. 266-269, 23 N. Y. 516, 521.

Griffith v. Insurance Co., 106 California, 627.

Goodwin v. Insurance Co., 66 Northwestern (Iowa) 157 at page 160.

Massachusetts Insurance Co. v. Hale, 23 Southwestern (Ga.) 849.

Mullen v. Insurance Co., 34 Southwestern (Texas) 605.

Insurance Co. v. Pollard, 26 Southeastern (Va.) 422.

Richardson v. Roland, 40 Connecticut, 565.

Arnold v. Potter, 22 Iowa, 194.

Bennett v. Eastern Building Ass'n., 35 Atlantic, 684, 177 Pa. 233.

Greisemere v. Insurance Co., 10 Washington, 208; also 212.

II

THE CLEMENT CASE CHIEFLY RELIED UPON BY PLAINTIFF IN ERROR IS NOT IN CONFLICT WITH THE PROPOSITION THAT A CONTRACT IS TO BE CONSTRUED BY THE LAWS WITH A VIEW TO WHICH IT IS MADE.

The cases cited by plaintiff in error which it claims hold against this contention of defendant in error are not in point. The one chiefly relied upon is the case of Wall vs. The Equitable Life Insurance Company, 140 U. S. 226.

In the first place there is no provision in the contract, (either in the policy or application which together make one contract) stipulating that the contract should be subject to the laws of New York.

In the second place The Equitable Insurance Company as a matter of comity not of right was permitted by the State of Missouri to come into that state and make contracts with the citizens of Missouri. Having been thus permitted to come into the state to make contracts with its citizens it was perfectly competent for the State of Missouri to impose such terms up-

on it and like companies as the state saw fit, or exclude the foreign insurance companies altogether from their territory.

Bank v. Earl, 13 Peters, 519.

Runyan v. Coster, 14 Peters, 122 at page 129.

Hooper v. State of California, 15 Supreme Court Reporter, 207 at page 220

The legislature had passed an act regulating the forfeiture of life insurance policies after the paying of two annual premiums, to the effect that the insured should have the benefit of his reserve by the way of extended insurance. This statute established the public policy of the State of Missouri relative to such contracts. By another provision of the law it was made the duty of any foreign insurance company, if it accepted the privilege of doing business in that State to make all its contracts in compliance therewith. The section last mentioned is in the following words.

"Section 5983. No policy of insurance on life, hereafter issued by any life insurance company authorized to do business in this state on or after the first day of August, A. D. 1879, shall, after payment upon it of two full annual premiums, become forfeited or void by reason of the non-payment of premium thereon, but it shall be subject to the following rules and commutations, to-wit:"

The policy in the Clement case was issued after the first day of August, 1879, as provided in the above section. It must be presumed the company was authorized to do business within the meaning of that section. If so, then it accepted the terms provided in the statute and was bound to make no contract of forfeiture in disregard of the statute. But this it did attempt to do, even though the contract was actually consummated in Missouri. This court held two things: first that the contract was a Missouri contract as it was there consummated; second, and more important than the above, it held that this statute could not be waived by the parties.

If the statute could not be expressly waived by the parties because of the provision of the statute above set forth (which is copied in the opinion of the court) then it must follow that it could not be done indirectly by making the place of contract outside of Missouri in order to avoid this statute. It would be a strange rule of law that would hold the parties could not waive a statute of Missouri and yet hold that it was competent for the parties to avoid the statute by making the place of contract elsewhere. It needs no authority to support this distinction. It suggests itself forcibly and distinctly. No other result could be reached logically. But we are not without authority on the proposition. It has been clearly recognized in two decisions of this court.

In the case of Hume vs. The Ins. Co. 128 U. S. 195 already cited the company was a Connecticut company. The contract was actually consummated in the District of Columbia, but the contract further provided that Hartford, Connecticut should be the place of contract. The Supreme Court of the United States held that the contract was subject to the laws of Connecticut and those laws should control as between the parties to the contract as well as creditors of the insured, and in so deciding, Chief Justice Fuller says:

"And if it is so as between Hume and the Connecticut Companies, then he could not at any time dispose of these policies without the consent of the beneficiary. Nor is there anything to the contrary in the statutes or General Public policy of the District of Columbia."

Washington Bank vs. Hume, 128 U. S. 195 on p. 207.

In other words if there had been a statute or public policy of the District of Columbia which the company was attempting to evade by making the place of contract, Hartford, Connecticut, such provisions of the contract would have been null and void.

In the case of London Assurance Co. v. Companhia De Moagens etc. *supra* the same destinction is recognized. In this case the contract was actually made in Philadelphia. The policy covered the vessel *en route* to Portugal. The contract was to be performed in England. This court held for that reason that it was an English contract and that it would determine the rights of the parties according to the English law inasmuch as construing it by the English law would not in any manner conflict with the policy of the State of Pennsylvania where the contract was actually made. The portion of the opinion below quoted suggests that if the parties were seeking to avoid the public policy of the State o Pennsylvania by making the place of contract England, it would not have enforced it according to the laws of England. The portion of the opinion referred to is as follows:

"This is what the parties expressly stipulated for, and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by, so long as, in a case like this, the foreign law is not in any way contrary to our own."

London Assurance Co. v. Companhia De Moagens De Barreiro, 167 U. S. 149.

This same doctrine with reference to this same Missouri statute is very forcibly set forth in a decision rendered by Judge Treat, in which Judge McCrary concurred.

Fletcher v. Insurance Co., 13 Federal Reporter, 562, at page 568.

In a subsequent case the above opinion was cited with approval by Mr. Justice Brewer sitting as District Judge.

Ball v. Insurance Company, 32 Fedreral, at 273, at page 275.

In a subsequent case Judge Caldwell sitting in the same

circuit concurred with Judge Treat, McCrary and Brewer in the opinions above referred to.

Berry v. Insurance Company, 46 Federal, 439, page 441.

Each of the other cases heretofore relied upon can be distinguished in the same way. In each case there was an attempt to make the place of contract in a State other than the one in which the insured lived, in order to avoid the Public Policy or statute of the state where the contract was actually consummated. These cases for this reason are not in point. In none of the cases cited, except the one in the 54 Fed. 580 which was affirmed in the 58 Fed. 723, was there a stipulation that the place of contract was other than the place where the contract was actually consummated. The Circuit Court of Appeals in affirming this decision of the 54 Fed. entirely ignores the point so strenuously insisted upon, but basis its decision on general laws entirely outside the applicability of the Iowa statute. One cannot read the two cases without at once being convinced that the Circuit Court of Appeals did not consider the decision of the lower court sound on the question of the "place of contract." But if it had it would not be in point because the stipulation making it a New Jersey contract to avoid a statute establishing the Public Policy of the State of Iowa would have been void. We ask the Court's careful attention to the decision of the Circuit Court of Appeals in connection with the 54 Fed. believing as we do that there is nothing in it to support plaintiff in errors' claim.

So considering the opinion of the Clement case wholly in connection with the facts in the case, it is very apparent that the true basis of the decision was that the assured living in Missouri, and the insurance company doing business in Missouri, must be subject to the public policy of the State of Mis-

souri, and that it would not allow the parties to withdraw themselves from the beneficial effects of the public policy and the statute of Missouri by making the place of contract outside of the state of Missouri.

III.

WE MAINTAIN THAT THE LEGISLATURE OF THE STATE OF NEW YORK INTENDED THAT THIS STATUTE SHOULD REGULATE THE MANNER OF FORFEITING POLICIES OF INSURANCE BY NEW YORK INSURANCE COMPANIES, NO MATTER WHERE THE CONTRACT SHOULD BE MADE.

a. The highest court of New York has held such was the meaning of the act.

One Carter was a resident and citizen of the state of Georgia. In 1870 the Brooklyn Insurance company of New York issued a policy of Insurance on his life. Where this contract of insurance was consummated is not shown in the opinion or statement of the case. The contract was made six years before the enactment of the law requiring notices. In 1877, 1878, 1879 and 1880 Mr. Carter paid his renewal premiums in Georgia, so according to the plaintiff in error's contention the contract of renewal was made in Georgia. It would not be a renewal within the meaning of the following opinion, until it was paid in Georgia. The Appellate Court of New York was compelled to pass upon thequestion whether or not the payment of a renewal premium was a renewal of the contract within the meaning of the statute. It held that it was. The opinion on this point is as follows:

"Upon this state of facts several questions arose upon "the trial among which the material ones are:

"First. Whether the law of 1876 requiring notices to "be sent to the policy holders, applies to this policy ?" * *

"It is contended by the appellant that the act applies "only to policies 'issued or renewed' after its passage, and "that a policy cannot be said to have been renewed unless "it has become forfeited or lapsed, and has been afterward "restored or renewed by the insurance company.

"The language of the statute, as expressed in the laws "of 1876, is that 'no life insurance company, doing business "in the state of New York, shall have power to declare "forfeited or lapsed any policy thereafter issued or renewed, "by reason of non-payment of annual premiums, or interest, "or any portion thereof, unless a notice in writing stating the "amount of the annual premium or interest due, and when "due on such policy, and the place where said premium or "interest may be paid shall have been duly addressed and "mailed by the company issuing such policy to the insured, "postage paid, at his or her last known post office address, "not less than thirty days nor more than sixty days next "before such payment becomes due according to the terms "of such policy.' This act was amended by chapter 321, "laws of 1877, but, so far as this case is concerned, in no "respect rendering a particular notice of the amendment "necessary. The act should be construed according to the "popular signification of the language used, and with the "view of securing to the policy holders in life insurance "companies the benefits contemplated by the legislature." * * * * *

"We are also of the opinion that the payment, and receipt by the company, of each annual premium constitute a renewal of the policy within the meaning of the term 'renewal' as used in the act."

(The renewal was made by the assured in Georgia.)

"While it was provided by the policy that it should "continue for the term of the natural life of the assured, it "was expressly provided that this was upon the condition "that he should pay the annual premiums as they become "due by the terms of the policy. A failure to pay such "premiums in any year was declared to render the policy "null, void, and of no effect, but when paid it continued by "force of such payment, the policy in existence for the

"period of another. This process each year revived or "renewed the policy as it approached the period of its agreed "termination:" * * * *

"We are, therefore, of the opionion that the plaintiff's "policy was renewed within the meaning of the act. We "are also of the opinion that no such notice was given to "him as the statute required. The law reads that the notice "should be sent to the assured at his known place of "address, and there is no claim but that the defendent knew "his place of address at all times subsequent to the year "1880."

Carter vs. Life Ins. Co., 110 N. Y., p. 15 on p. 20.

Again the appellant court of New York in the 119 N. Y. 450, p. 454, uses the following language:

"The policy itself contained the stipulation that it was "a contract made and to be executed in the state of New "York, and construed only according to the laws of that "state. Aside from the provisions of the policy, and under "general rules of law, the contract was subject to the terms "and conditions expressed in chapter 341 of the laws of 1876, "as amended by chapter 321 of the laws of 1877. This "statute was a part of the contract in question and governed "the rights and obligations of the parties in precisely the "same way, and to the same extent as if all its terms and "conditions had been actually incorporated into the policy."

Baxter vs. B. L. I. Co., 119 N.Y., 450 on 454.

No facts are stated in the above opinion as to the residence of the parties or as to how the question of the applicability of the statute arose. But the language is meaningless unless a similar contention was made to that of plaintiff in error in this cause.

If the appellate court has held according to our contention then this court will follow the construction of this statute placed upon it by the highest court of New York.

"Statute laws may, we think, be properly defined as "the will of the nation expressed by the legislature, ex- "pounded by the courts of justice. The legislature as the

"representatives of the nation expressed in the national will "by means of statutes. Those statutes are expounded by "the courts so as to form the body of the statute law."

Wilberforce Statute Laws, p. 8.

"After a statute has been settled by judicial construction, "the construction becomes, so far as contract rights acquired "under it are concerned, as much a part of the statute as "the text itself, and a change of decision is to all intentions "and purposes the same in its effect on contracts as an "amendment of the law by means of a legislative enact-"ment."

Douglas vs. County of Pike, 101 U. S., 677 on p. 687.

"The rule which has been uniformly observed by this "court in constucting statutes, is to adopt the construction "made by the courts of the country by whose legislature the "statutes were enacted."

Cathcart vs. Robinson, 5 Peters, 264 on p. 280.

"Consequently our duty is, without reference to our "former decisions, to adopt in this case the construction "which the Supreme Court of North Carolina has given to "the limitation statute of that state."

Davie vs. Briggs, 97 U.S., 628 on page 638.

See also Endlich on Interpretation of the Statutes, 1st Ed., Secs. 1264, and cases cited.

b. The language of the act clearly shows it was intended to limit the power of corporations to forfeit a contract except in the manner provided by statute.

We further contend that this statute was in effect an amendment of the charter of every life insurance corporation chartered by the legislature of New York, and that even though the Appellate Court of New York had not passed upon the question and the question was to be here decided for the first time, this court must hold that this statute was a limitation on the powers of the corporation to

forfeit the contract except in the manner pointed out by the statute.

Appellant's contention that the statute was meant only to apply to contracts actually made in New York cannot be maintained. True, the laws of New York could only effect foreign insurance companies when they came within its dominion. It had no further control over them But this corporation that the state gave being, is controlled by it wherever it goes. Will plaintiff in error maintain that this corporation can step beyond New York and make a contract it cannot make in the home state? Does its power to contract along any line increase as it passes the border line of New York? Can it accept a contract from non residents of the state of New York, when it has no power, and it would be unlawful for it to accept a like contract from a resident of its home state? All applications must be accepted at the home office in New York and the policies issued therefrom. Can it make any difference from whence the proposition come, whether from inside or outside of the state? Its powers cannot be one whit greater outside than inside. The foreign state may further limit the power of such corporations in business done in such state, but it cannot increase it. Does the state of Washington when, as a matter of comity to other states, she permits the insurance corporations of such states to come within her borders to trade with her citizens, permit them to come in like free booters, without restraint from the law or charter of the home state, and especially from such provisions in such law or charter, particularly provided for the protection of such parties who deal with such corporations?

This rule was adopted in a case reported in the 138 Pa. upon the following state of facts. The legislature of the

state of Pennsylvania in 1881 passed an act requiring insurance companies "insuring property and lives within the commonwealth of Pennsylvania," to attach to their policies a copy of the application or else they could never rely on a breach of warranty in the application or misrepresentation in it, defeat the policy. The company insured this property in Virginia, where it was located, the contract being there made. The company insisted that the act applied only "to property and lives insured in the state of Pennsylvania." In reply to this argument the Supreme Court of Pennsylvania says: "It is urged, however, that this act of 1881 applies only to "policies upon the lives or property of persons within this "commonwealth, and that as the property insured by the de- "fendant was located in West Virginia the rule above "stated does not apply. We regard this as a narrow con- "struction of the act. We think that it was intended to pro- "duce a uniform rule of procedure, and to apply to all insur- "ance companies incorporated by the laws of this state and to all "other insurance companies insuring lives or property within "this states."

Hebb. vs. Insurance Co., 138 Pa. St., 174 on p. 180.

The same rule is laid down by the Supreme Court of Maryland in the decision reported in the 74th Maryland, upon the following state of facts:

A Pennsylvania corporation received an application in Baltimore, delivered the policy there on receipt of the first premium in Baltimore, Maryland. The law of Pennsylvania above cited contains a further provision that: "Whenever an application for a policy of life "insurance containing a clause of warranty of the truth of the "answer therein contained, no misrepresentation or untrue "statement in such application, made in good faith by the ap- "plicant, shall effect a forfeiture or be a ground of defense, "in any suit brought upon any policy of insurance issued upon

"the faith of such application, unless such misrepresentation "or untrue statement relates to some matters material to the "risk."

The company, regardless of this statute, made every answer in the application an absolute warranty, and were insisting on the breach of warranties as a defense. They insisted that the law did not apply. The Supreme Court on this point used this language: "But the statute of Pennsylvania "which was offered in evidence, enacts that in such cases no "misrepresentation or untrue statement in the application "made in good faith by the applicant, shall effect a forfeiture "or be a ground of defense, unless it relates to some matter "material to the risk. It is beyond question that the powers "and capabilities of a Pennsylvania corporation are conferred "and regulated by the laws of that state, without its author- "ity it could not exist at all. Every contract it makes, every "act it performs, every right it acquires, and every obliga- "tion it assumes, must be by virtue of the same authority. It "may make contracts, transact business, sue and be sued, be- "yond the limit of the state of its origin. But all these "transactions are by the permission of the state where they "occur, and not by virtue of any right belonging to the cor- "poration. Everywhere within and without the state which "created it, its contracts are limited, construed and sustaining "according to its charter and the laws which effect its opera- "tion. In McKine vs. Glen, 66 Mo., 484, this Court said: 'It "is a similar principle, that a corporation and all who deal "with it, are bound by the law of its creation, and all such "laws may be legitimately prescribed by its government by "the sovereign authority from which it derived its corporate "existence.' "

Insurance Co. vs. Ficklin et al, 74 Myd., 172, on p. 180.

A like rule is laid down by the Supreme Court of the United States. In one case a Missouri insurance corporation

became insolvent. It had both property and creditors in Louisiana. The creditors went into a Louisiana court and had a local receiver appointed. By the Missouri statute the insurance commissioner of that state was the party who took possession of the effects and wound up the affairs of such corporations. On the question as to whether the Louisiana receiver, who was the first to get possession of the effects in that state or the insurance commissioner of Missouri should have possession of the property in Louisiana, the Court was called upon to decide and in its decision used the following language:

"Relfe is not an officer of the Missouri State Court, but "the person designated by law (the Missouri state law) to "take the property of any dissolved life insurance corporation "of that state and hold and dispose of it in trust for the use "and benefit of creditors and other parties interested." "*The law which clothed him with this trust was in legal effect "part of the charter of the corporation.* He was the statutory "successor of the corporation for the purpose of winding up "its affairs. * * * We are aware that except by virtue of "some statutory authority, an administrator appointed in one "state cannot generally sue in another, and a receivor appoint-"ed by a state has no extra-territorial power. But a corpor-"ation is the creature of legislation, and may be endowed with "such powers as its creator sees fit to give. * * * * No "state need allow the corporations of other states to do busi-"ness within its jurisdiction unless it chooses, with perhaps "the exception of commercial corporations; but if it does with-"out limitation expressed or implied, the corporation comes in "as it has been corporated. Every corporation necessarly "carries its charter wherever it goes, for that is the law of "its existence. It may be restricted in the use of some of its "powers while doing business away from its corporate home, "but every person who deals with it everywhere, is bound to "take notice of the provisions which have been made in its "charter for the management and control of its affairs both "in life and after dissolution."

Relfe vs. Rundle, 103 U. S., 222, p. 225-6.

The same rule was laid down in Fry vs. Charter Oak Life (Ins. Co., 31 Fed. Rep., 197.)

In a later case the United States Supreme Court adheres

to the rule above stated. The following citation will not show fully how far that court carried the rule; a careful reading of the case will only disclose that.

"A corporation 'must dwell in the place of its creation, "and cannot migrate to another sovereignity.' (Bank of Au- "gusta vs. Earl, 13 Pet., 588), though it may do business in "all places where its charter allows and the local laws do not "forbid. Railroad vs. Kootz, 104 U. S., 12. But wherever it "goes for business it carries its charter, as that is the law of "its existence. (Rolfe vs. Rundle, 103 U. S., 226) and the "charter is the same abroad as it is at home. Whatever dis- "abilities are placed on the corporation at home it retains "abroad, and whatever legislative control it is subject to at "home it must be recognized and submitted to by those who "deal with it elsewhere. * * * * He is conclusively pre- "sumed to have contracted with a view to such laws of that "government, because the corporation must of necessity be "controlled by them, and it has no power to contract with a "view to any other law with which they are not in entire "harmony."

Canada S. R. R. vs. Gebhart, 109 U. S., 527, p. 537-8.

The question of the construction of this New York statute was before the court of civil appeals of Texas, and it sustained our theory as follows:

"The laws of New York (the statute regulating forfeiture of life insurance(would apply to contracts made by insurance companies chartered under its laws, whether the contracts were made in New York or in any other state in the union."

Gunn vs. Miller, 26 S. W. (Tex.), 280, on p. 282.

The Supreme Court of Texas has held that a contract made between a raiaload, chartered by Missouri, and one of its officers in Texas, where the contract was to be wholly performed and which was contrary to the statute of Missouri, prohibiting such corporations from making any contract with one of its directors, was absolutely void. Its opinion in part is as follows:

"Appellee owes its existence to the constitution and laws "of the state of Missouri, under and by virtue of which it

"obtained its being and from which it derived all its "powers. Natural persons may make any contract or "perform any act not prohibited by law, while artificial per- "sons, corporations, can do only those things which by ex- "press grant or necessary implications, they are authorized or "empowered to do by the state under which their charters "were obtained. * * * Had the contract been entered "into by the president and secretary of the company, after "resolution adopted by the board of directors authorizing "them to make it, and had it been executed with strict "observance of all formalities, it would have been void, be- "cause it was prohibited by the laws of the state from which "appellee derives its existence and powers."

Rue v. Missouri Pac. Ry. Co., 74 Tex., 479.

Story on Conf. Laws, 174, 175, note a.

Matthews v. Skinner, 62 Mo., 331.

Black v. Canal Co., 22 N. J Eq., 422.

IV.

THE STATUTE OF NEW YORK COULD NOT BE WAIVED BY STIPULATION TO THAT EFFECT IN THE CONTRACT.

The statute of New York referred to is in part as follows:

"Section 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest or any part thereof, except as hereinafter provided. * * * anything contained (in the policy) to the contrary notwithstanding."

It is not pretended by the company that it ever served the notice prescribed in this statute. In fact the company expressly disclaimed having served the statutory notice. Record p. 190-2. But it insists that the above statute was waived by express conditions to that effect in the policy.

If there is any well settled proposition in law relative to insurance contracts, it is that it is not competent for the parties to such contract to waive the statutes of this character which are based on public policy. This statute was enacted for the purpose of protecting the insured against forfeiture without timely notice. It was intended that the insured should have fully thirty days' notice of the time of payment of his premium, and the same full thirty days in which to prepare for the payment of the same. This statute had scarcely received the signature of the Governor of New York before many of the insurance companies undertook to circumvent the good results intended, by such a clause as this. As a result several courts have been called upon to determine the validity of such a clause, and the conclusion reached by each of the courts has been against the validity of such a stipulation. The Supreme Court of California states the conclusion it reached in part in the following language: "It would seem, "however, that the New York statute was intended to cut "deeper, and as a matter of public policy to inhibit forfeitures "by life insurance companies, except by the method therein "provided.

"No life insurance company doing business in this state "shall have power to declare forfeited or lapsed any policy "* * by reason of non-payment of premium. etc., except as "therein provided.

"The statute is a limitation on the power of the company "to do a specified thing, except under prescribed conditions. "That which a corporation has not power to do, if attempted "to be done by it, is ultra vires, and void.

"Admit that Griffith attempted to waive all notice of "nonpayment of premiums, if the power was lacking in the "corporation to declare a forfeiture in consequence thereof, it is "not perceived how it can be done. The very idea of a waiver "involves the right of the contracting parties to make and "accept such waiver—consent never gives jurisdiction not other-

"wise possessed of the subject matter to a court, for the reason "that it lacks the power to adjudicate such subject matter, ex- "cept as conferred by law.

"A corporation being the creature of the law must confine "its functions to the limits prescribed for its action, and if the "law expressly inhibits it from doing a given thing it is power- "less to do that thing, and, if it can do it only in a given man- "ner, the prescribed method become the measure of its power."

"We are not met with any suggestion that the statute in "question is violative of any chartered right of the defendant, "and, in the absence of a showing to the contrary, must assume "the New York statute to be in consonance with its constitu- "tional and chartered rights."

"The statute in question is regarded as indicative of the "legislative will that, aa a matter of public policy, life insur- "ance companies should be deprived of the power to declare "policies forfeited for non-payment of premiums,except in the "prescribed mode, and that being deprived of the power so to "do, a waiver on the part of the insured cannot be construed "to confer such power in the face of the law which has taken "it away."

"The reasons for such a policy are so numerous and obvi- "ous that it is not deemed necessary to occupy time and space "in specifying them."

Griffith vs. New York Life Ins. Co., 101 Cal. 627 on p. 641–2.

The Supreme Court of Michigan announced the same result in construing a policy of insurance made in New York and subject to a similar made in reference to assessment societies passed in 1892. It uses the following language: "The contract of insurance was made in the state of New York, and is governed by the laws of that State. * * * * The notice sent to the insured, in the present case, did not comply with this statutory provision. The design of the statute is apparent. A policy in regular life company fixes both the time of payment of premium and the amount thereof; yet that same statute provides that no life insurance company can

declare forfeited or lapsed any policy by reason of the non-payment of any premium without notice, and prescribe what such notice must contain. It further provides that, in case payment is made within the life of the notice, it shall be taken to be in full complicance with the requirements of the policy, anything therein contained to the contrary notwithstanding. Their statutory provisions form a part of the contract of insurance and cannot be waived by the parties. Not having given such notice in the manner prescribed by the statute, it cannot be allowed to declare a forfeiture of the policy by reason of its non-payment."

Warner vs. Life Association, 100 Mich. 157 on p. 159-60.

The Supreme Court of Washington had the same question before it in construing the same law in reference to an insurance contract that contained this same clause verbatim, though the point was not discussed in the opinion yet it was presented fully, and of course was fully considered by the court in its deliberation thereon. In order that this court may know that the same point was before it we will ask leave to file one copy of appellant's brief and one copy of respondent's brief.

Grisemer vs. Insurance Co., 10 Wash. 202 and 211.

The ninth Circuit Court of Appeals uses language appropriate to the discussion of this point.

"The statute of New York, (the one we are here considering) prescribes the conditions on which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not subject to be set aside or waived by the company, or the assured, or by both together. Society v. Clements, 140 U. S. 226, 233; Hicks v. Insurance Co,, 9th C. C. A., 215; Griffith v. Insurance Co.,(Cal.) 36 Pac. 117; Warner v. Association, 100 Mich., 157."

Nixon v. Insurance Company, 81 Federal, 796, 802.

The Supreme Court of Virginia, in a policy almost identical in its terms with the one in this case, where the contract

was made in Virginia and contained a clause stipulating away the provisions of a statute of Ohio where the contract was to be performed, held that such waiver was a nullity in the following words:

"It, (the statute)is therefore as much a part of every contract insurance of life governed by the laws of the state of Ohio and made after that statute was passed, as if incorpated in it; the general rule being that laws in existence are necessarily referred to in all contracts made under such laws,and no waiver of the parties nor stipulations in the contract can change the law. Hermany v. Ins. Co., 151 Pa. State, 17; Ins. Co. v. Ficklin, 74 Md., 172; Ins. Co. v. Leslie. 47 Ohio State, 409; White v. Society, 163 Mass, 108."

Insurance Co. vs. Pollard, 26 Southeastern, 421, p. 422.

The Supreme Court of Maryland has passed on a very similar condition in a policy of insurance that attempted to stipulate away a law for the benefit of the insured passed by the legislature of Pennsylvania. The contract was made in Maryland, but the corporation was chartered in Pennsylvania, a case clearly in point. The Supreme Court speaking through Mr. Justice Bryan, uses the following forcible language: "The Pennsylvania statute enacted that whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant shall effect a forfeiture. * * *

"In other words, the statute is to be entirely overthrown and set aside; and the insurance company under the guise of an agreement, is to acquire the power to accomplish the very result which the statute intended to prevent. Statutes would be very ineffective if they could be defeated in this way. If an untrue statement material to the risk is warranted, the policy is void; but the invalidity of the policy depends upon the fact whether the statement is material to the risk. The materiality of the statement is the indispensible condition on which the invalidity of the

policy depends, and it must be established by proof. It is not competent to substitute for this proof an agreement of the parties that it should be considered material. Neither can an agreement be valid which gives an effect to a warranty, which is in defiance of the statute. The legislature enacted a rule for the regulations of the contracts of insurance companies, which is a matter of public interest and concern. The operation of this rule does not depend on the agreement of these corporations to adopt it as a basis of their contracts; on the contrary, the rule prescribes the scope and effect of policies of insurance, and authoritatively determines the duties and obligations which arise from them."

Fidelity Ins. Co. vs. Ficklin, 74 Md. p. 172 on p. 185-6.

The Supreme Court of the United States has held the same in deciding the validity of such a condition stipulating away the benefit of a Missouri statute. The court says: "It follows that the insertion in the policy of a provision for a different rule of computation from that prescribed by the statute in case of a default in the payment of a premium after three premiums have been paid; as well as the insertion, in the application, of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not, is an ineffectual attempt to evade and nullify the clear words of the statute."

Insurance Co. vs. Clemens, 140 U.S. 226, on p. 234.

The Supreme Court of Pennsylvania has held that a statute of this kind cannot be waived. The opinion of the court is in part as follows:

"In the portion of the charge recited in the 17th specication, after referring to provisions of the act of 1885, relating to warranties in applications for life insurance policies, heretofore briefly noticed, and also to the fact that the policy in suit contains a waiver by the insured of the provisions of any statute which might affect the contract of of insurance as expressed in said policy, etc., the learned

judge held in substance, and so instructed the jury, that notwithstanding such comprehensive waiver, full force and effect must be given to the provisions of said act. * * *

"The evident purpose of this legislation was to strike down, in this class of cases, literal warranties so far as they may be resorted to for the disreputable purpose of enforcing actually immaterial matters. This provides a rule of construction for the purpose of preventing injustice; and it is as much the duty of courts to enforce such rules as it is to administer the statutes of frauds and perjuries. It would be contrary to public policy to recognize the right of parties to circumvent the law by setting up a waiver such as was insisted on in this case. The court was therefore right in holding that the was invalid.

Hermany vs. Life Association, 151 Penn. 17, on p. 24.

Judge Brewer, when sitting as circuit judge in the western district of Missouri, had occasion to review this question, and in a very able opinion says:

"Such seems to have been the thought of the Missouri legislature, and it evidently intended by its legislation to provide a fixed and absolute rule applicable to all cases, absolute and universal, because if it applied only in cases in which the policies were silent, or if it could be waived or changed, a child can see that it would protect only so far as the insurance companies were willing. So, although no words of penalty are attached, no express denial of the right to waive, in fact no words of negation in any direction, yet it seems to me fair to say that the affirmative language of this statute discloses a public policy which no court ought to question or refuse to enforce. Railway Co. vs. Peavey, 29 Kan. 169. The legislature has by this language declared a rule in respect to forfeitures in life insurance policies; it has thus established the policy which it believes should obtain in this state, and, though sitting on the federal bench, it is my duty to administer the laws of this state in the spirit in which they were enacted, and to uphold both their letter and their spirit."

Wall vs. Equitable Assur. Soc. 32 Fed. 273 on p. 277.

A case from Georgia is also in point. "The contract was

made in Georgia, but, as in this case, it was expressly stipulated in the contract that it should be subject to the laws of the state of Massachusettes, in which state it was provided by statute that "no such company (Insurance company) shall make any stipulation in its insurance contract concerning the court or jurisdiction wherein the suit thereon may be brought, nor shall limit the time in which suit may be commenced to less than two years after the cause of action accrues, and any such condition or stipulation shall be void. Held, that the stipulation in the policy limiting the time in which suit may be commenced thereon to one year from the termination of the life of the member to whom it is issued is void."

Insurance Co. v. Hale, 23 Southeastern, 849.

In a recent case in the Court of Appeals of Texas that court passed upon the question of waiver of this particular statute. The syllabus as it appears in the Southwestern Reporter states the decision of the court accurately in the following words:

"Though a policy of life insurance was issued by a New York company to a citizen of Texas, containing a provision to the effect that, if any of the premiums were not paid when due, the policy would become void, and that notice that each premium would be due at the date named in the policy was given by the policy, and that any other notice required by any statute was thereby expressly waived, the statute of New York enacted in 1876 (requiring notice to be mailed to the assured at least thirty days before the premium was due, in order to cause a forfeiture) applied, and a notice sent 15 days before the premium was due was insufficient."

Insurance Co. v. Smith, (Texas) 41 Southwestern, 680.

Similar quotations might be made from many other courts, some of which we will have occasion to cite subsequently in discussing other points.

We will at this point add the following references.

Reilly vs. Insurance Co. 43 Wisconsin 449.

Chamberlin vs. Insurance Co. 55 N. H. 249.

Emery vs. Insurance Co. 52 Me. 322.

White vs. Iusurance Co. 4 Dil. 177.

Ins. Co. vs. Leslie 47 Onio St. 409.

White vs. Society 163 Mass. 108.

Ins. Co. vs. Rudwig 80 Ky. 223, 233-5.

b

The statute of New York is a limitation on the power of an insurance company to forfeit a contract of insurance except in the manner provided by statute.

1. We have already discussed this proposition in preceeding portions of this brief on pages 51 to 62 inclusive and will not extend the argument along that line line, but respectfully request and urge the court to consider the whole of that argument in connection with and as a part of the argument on this point.

We have shown, we think conclusively, in the preceeding argument that the highest court of New York in the cases of Carter v. Insurance Company, 113 New York, 110, and Baxter v. Insurance Company, 119 New York, 450 on page 454, sustains this contention. If we are right in this, those decisions must control every contract made with a New York insurance company issued subsequent thereto, no matter where made.

2. We have also shown that the language of the act clearly shows that it was the intention of the legislature to limit the power of the Insurance corporations chartered by

the state of New York to forfeit such contracts, except by strict compliance therewith. This being true, it will not be contended for a moment that the attempt to waive the statute by a clause to that effect in the contract would have any force or effect, because the statute expressly provides that a policy shall not be forfeited for non-payment of a premium except by service of the statutory notice, "anything to the contrary notwithstanding," thus specifically including the right of waiver. So without repeating the argument and reciting the authorities, we earnestly request to consider all of the argument heretofore urged on pages 51 to 62 inclusive, as fully supporting this contention.

c

A contract void in whole or in part by the laws of the place of performance is void everywhere.

We have already shown that this contract was to be performed wholly in New York. The Insurance Company by the terms of the contract which it prepared could exact performance at its home office in the city of New York and not elsewhere. By the laws of that place it could only exact performance of the payment of a premium by serving the statutory notice. If any forfeiture occurred it was by reason of the non-payment of a premium on a policy in the City of New York. If any right to declare a forfeiture occurred it was by reason of a non-payment of a premium—a non-performance of the contract—in New York, but no right of forfeiture of an insurance contract could occur, no right to declare a forfeiture could exist in New York until the statutory notice had been served. Service of the statutory notice

was a prerequisite to the right of forfeiture, or the right to declare a forfeiture on behalf of the insurance company. In other words, the plaintiff in error, in so far as it was exacting or insisting on a forfeiture, was doing business in New York within the meaning of the act, and within the jurisdiction of the New York laws, and it had no right to declare a forfeiture, except by a strict compliance on its part with such laws.

In a recent case decided by the Court of Appeals of New York it stated the proposition in these words:

"A contract which is illegal and void, either by the law "of the place where it is made, or that of the place "where it is performed, is illegal and void everywhere."

Hyde vs. Goodnow, 3 N. Y., 266–269.

This decision having been announced prior to the execution of this contract was as much a part of the contract as the statute. The company knew that such would be the construction of the contract by the courts of that state whenever it undertook to enforce the forfeiture provision of the policy in New York where it alone could exact a forfeiture.

The Supreme Court of Missouri on the same question used this language:

"A contract for a loan made payable in a foreign country may stipulate for interest higher than allowed at home, and if the contract is illegal there it will be illegal everywhere."

Bank of Louisville vs. Young, 37 Mo. 378

In a case decided in the Supreme Court of Massachusetts, Justice Carey uses this language:

"The notes in suit having been made and payable in Louisiana, the question of the validity depends upon the law of that state. If they are void by that law, they are void everywhere."

Stevenson vs. Payne, 109 Mass 378.

Mr. Story in his "Conflict of laws" (Redfield's edition), section 242, uses this language:

"Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country, for, as we shall presently see, in the latter case the law of the place is to govern. If valid there, it is by the general law of nations, *jure gentium*, held valid everywhere."

Section 253: "The same rule applies *vice versa* to the validity of contracts. If void or illegal by the law of the place of contract they are generally void and illegal everywhere."

Our contention then is not only supported by authority, but it is by reason as well. Supposing a railroad corporation chartered by New York had a line of road from New York to Albany. That it was contrary to the public policy of that state for such companies to exempt themselves from negligence by a clause to that effect in a contract to carry a passenger over their lines. That it had an agent in the state of Washington who had in its behalf entered into a contract with a citizen of Washington to carry him from Albany to New York, with a clause in such contract exempting itself from liability from damages on account of negligence of its officers and agents, and that such a waiver of a liability was perfectly proper according to the laws of Washington. Would it be contended for a moment that such a waiver would be of any force or effect when the contract was to be wholly performed in New York?

Such a construction of the contract can do no injustice to the Insurance Company. The Insurance Company being a citizen of New York is conclusively presumed to have known the statutes and public policy of that state. It drew the contract in such form and in express words made it subject to the laws of New York. It knew that the courts of New York, as well as any

other court, would not enforce a contract of forfeiture within New York except in compliance with its laws. It knew it was inserting in this contract an agreement in entire disregard of the public policy of the state in which it had caused the contract to be performed. This court must decide this case and enforce this contract just as the courts of New York would, if the matter was before them. Would the Appellate court of New York enforce a forfeiture of contract to be performed in New York contrary to and in entire disregard of the public policy and statutes of that state?

The business, the making of the contract, was business done in New York. If any forfeiture occurred it occurred in New York, any right to declare a forfeiture occurred by reason of non-payment of a premium,—a non-performance of the contract in New York.

As we have already shown this statute is a limitation on the powers of every corporation organized in New York and they cannot forfeit a contract except in compliance with it. That the legislature of New York had the power to thus limit them is not disputed. The appellate Court of New York, as we have already shown, were similar and the court held to the same rule. Either all these courts are wrong, together with other courts, to which we have cited this court or else the company is wrong in its contention.

V.

KNOWLEDGE OF THE DUE DATE OF THE PREMIUM BY THE INSURED DOES NOT AVOID THE SERVICE OF THE STATUTORY NOTICE. THE SERVICE OF A NOTICE WHICH DOES NOT CONFORM IN MATTER OR CONTENTS TO THE REQUIREMENTS OF THE STATUTE, AND NOT SERVED THE THIRTY DAYS REQUIRED BY THE STATUTE, IS OF NO AVAIL.

Plaintiffin error claims that the converse of each of the above propositions are true, and that the court erred in refus-

ing the requested instuctions to that effect, and as contained in specifications of errors 21 and 22, Record, page 378-9.

The court did not err in refusing said instructions for the following reasons:

a. Specification of Errors XXI., XXII., are not well taken because they are not based on instructions which assume facts of which there was no proof.

b. Knowledge of the due date of the premium by the assured does not avoid the service of the statutory notice in order to forfeit tne contract.

c, The company did not allege the service of any notice, but on the contrary stated to the court and counsel it was not claiming to have sent any notice and would not on the trial of the cause.

a

The instructions requested by plaintiff in error and assigned as errors were properly refused on the well established rule that it is wrong to base an instrnction on assumed facts of which there is no evidence to establish. The above instructions requested the lower court to charge the jury if they should find that "Mr. Phinney (1) came to the representatives of the company, and requested further time in which to pay said premium, (2) and such extention of time was refused by said representative, (3) and said Phinney knew and recognized the fact to be that his policy would be forfeited unless the premium was paid, (4) and the said Phinney thereupon stated that he was unable to pay such premium * * * then you must find a verdict for defendant."

There is absolutely no evidence which tends to establish eiither of the above four probative facts included in both requested instructions. All the evidence on the same is set forth

in the record, on pages 176 to 194 inclusive, under heading *20th exception.* There is not only no evidence tending to support such probative facts, but all the evidence is absolutely contradictory thereof. As the evidence is quite short, for the convenience of the court, we will quote it in full:

"Q. What did Phinney do in response to that notice, if anything?" A. About ten days before the premium was due I met Mr. Phinney on the street, and he said that he had received a notice from the company and asked me if I could not take his note for the payment of the premium for sixty or ninety days. I told him that I was not in a position to do so, because I did not have the money to remit to the company, and they would take only cash. I think a few days before it was due, perhaps three or four days, I met him again, and we had a similar conversation, and I told him about the same again, that I was unable to carry his notes; that I did not have the cash to put up to the company.

"Q. Did he ever make any payment of that premium you?" A. Not to me; no, sir.

"Q. Who else in the State was authorized to receive and collect premiums?" A. No one.

"Q. Did you have any conversation with Mr. Phinney subsequent to the time that this premium became due and was unpaid with reference to this particular premium? A. Yes, sir; we had several conversations regarding the premium. I think about two weeks after it was due, about ten day, I should say—between one and two weeks after it was due, he spoke to me again about it, and then I should say from four to six weeks after it was due he finally saw me about it, and then he told me that he was prepared to pay the premium.

"Q. What, if anything, did he ask you to do? A. He told me that if I would bring the renewal receipt, or words to that effect, that he would pay the premium.

"Q. State what occurred between you and what you said to him and what he said to you." A. I told him that I could not not accept the premium at that time unless he could give a certificate of health, and I think I furnished him the blank—I am not positive about that. He told me that he did not think that he could pass for a certificate of health, from the fact that he had been rejected by the Equitable a few days before.

"Q. When did you next see him?" A. Well, I saw saw him so often I could not fix any particular date. Copy (265).

"Q. You say Phinney let you have this policy for canvassing purposes?" A. Yes, sir.

"Q. Now, you would not care to have a dead policy for canvassing purposes?" A. It would not make any difference whether it was dead or alive.

"Q. You would not want to say that Phinney has a policy issued for a hundred thousand and it was such an expensive contract?" A. That is part I should not state if I was canvassing. I should show the contract.

"Q. For the purpose of soliciting you would let them understand it was a live policy?" A. Yes, sir.

We do not think any argument is necessary. The above quotation containing all the evidence, and the evidence too, of their own witnesses, condemns the instructions requested. Mr. Phinney was arranging for the payment of the premium by short time note. The note, not an extension of time, was refused. Even though an extension of time was not asked, the evidence shows that the company constantly led Mr. Phinney to believe, both before and after the due date, of the premium, that if he could get the money it would accept it in payment of the premium, hence, by its conduct granted an extension of time. This is all the evidence of a request of an extension of time, and

on the other hand that the company granted an extension. The very opposite of the assumption that an extension of time was refused. (3). Phinney could not know and recognize that the policy would be forfeited unless the premium was paid, except on condition of prior statutory notice. If he did think so it would be a mistake of fact. The mistake of the law of another state is a mistake of fact not of law. (4). The above evidence shows conclusively that Mr. Phinney did not state "that he was unable to pay the premium," but on the contrary shows that he was maintaining that he could pay it, and finally proved that he was stating the truth by tendering the premium. This same agent, in his report to the company, by letter, dated November 26, 1891, said "Phinney offered to pay (premium) but in ill health," also on December 10, 1891, the agent of the company, in response to telegram from the company instructing the agent not to accept Mr. Phinney's premium if tendered, answers as follows:

SEATTLE, Washington, Dec. 10, 1891.

"*A. B. Forbes, Esq., General Agent.*

"DEAR SIR,—Your wire of the 9th inst., reading, 'If tendered, decline acceptance September premium No. 422198, Phinney,' duly received.

This prewium was tendered a few weeks ago, but wus refused by me, as applicant is now a very bad risk.

Yours very truly,

F. L. STINSON."

Does the above show that the company and its agent understood Mr. Phinney to say he could not pay the premium?

b

Knowledge of the insured of the due date of the premium does not avoid the serving of the statutory notice.

The legislature of New York provided that the only method of forfeiting a contract was by serving the statutory notice in the manner prescribed by the statute anything in the contract to the contrary notwithstanding. It provided one method and one method only for forfeiting the contract and for proving such forfeitute. No other method or form is recognized by the statute. No other reason for this rule need be stated. The decision of the courts are uniform to the effect that even though a printed notice is served the statutory time it is unavailing if there is any departure from the requirements of the statute as to form or contents. In each of the cases hereafter cited under this point the assured had actual notice, but not the statutory notice. The court of appeals of New York in a case where a like contention was urged, uses this language.

"We are also of the opinion that the notice does not in its terms conform to the statute. Many ignorant and unlearned people seek to avail themselves of the advantage proposed by these companies. The statute is designed for the protection of all classes, and the language it prescribes for notice is intelligible to all. To say that in a declared event 'a policy will become forfeited and void,' conveys a meaning easily to be comprehended. To refer to the policy and conditions and say that 'members neglecting so to pay are carrying their own risk,' is quite another thing; and while it may be comprehensible to those versed in the language of insurers and accustomed to their phraseology, it is not the language of the statute and does not embody the notice which the statute requires. The principle upon which our decision, in the recent case of Carter vs. Brooklyn Life Insurance Company (110 N. Y. 15) rests, applies and requires that the appeal should succeed."

Phelan vs. Northwestern Mutual L. Ins. Co. 113 N. Y. 147 on p. 151-2.

In a prior case the Lower Court uses this language:

"The statute,, however, imposed the duty upon the defendant of sending the notice to the plaintiff in a particular manner and when it did so it acquired the right to declare a policy forfeited for the non-payment of the stipulated premiums. It was, therefore, incumbent upon the defendant to show that it had complied with the terms of the statute, and

it did not do this by showing a delivery of the notice to another person than the plaintiff. Such notice gave it no right to declare the policy forfeited, and in so doing it acted illegally."

Carter vs. Ins. Co. 110 N. Y. 15 on p. 23.

In subsequent case the same court uses this language:

"Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, and this step was essential in order to put the assured in default, or to raise any point based on his omission to pay the last quarterly premium."

Baxter vs. Ins. Co. 119 N. Y. 450 on p. 455.

In a later case the same court says:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it becomes unnecessary to consider the question of the sufficiency of the notice served."

De Frece vs. Insurance Co. 136 N. Y. 144 on p. 151.

An examination of the above cases from the highest court of New York will show that it fully sustains the doctrine announced. They have been followed fully in every other court when the same statute has been under consideration. The Second Circuit Court of Appeals sitting in New York when a like question was before it speaking through Judge Wallace says:

"The polices, being New York contracts, were, of course, dominated by the statute respecting forfeitures, as completely as though the statutory conditions had been explicitly incorporated in them. The adjudictions of the highest court of the state treat it as one which must be strictly interpreted in favor of the assured, and hold that the defense of a forfeiture through no-payment of premium is not availing to an insur-

ance company, if there has been any departure on its part from the provisions of the statute in regard to notice. (Carter vs. Insurance Co., 110 N. Y. 15, 17 N. E. 396; Phelan vs. Insurance Co., 113 N. Y. 147, 20 N. E. 827; Baxter vs. Insurance Co., 119 N. Y. 450, 23 N. E. 1048; McDougall vs. Assurance society, 135 N. Y. 551, 32 N. E. 251; De Frece vs. Insurance Co., 136 N. Y. 144, 32 N. E. 556,) The statute declares, in substance, that no policy shall be forfeited for default in the payment of premium until a notice shall have been served by mail upon the assured, calling his attention to the day when a payment has fallen due, and to the consequence of a default. The notice must state that, unless the premium shall be paid in 30 days after the mailing of the notice, the policy will become void. The intention is obvious, from the language, that the person insured shall have 30 days within which to make payment and save forfeiture after the mailing of the notice. The policy cannot be forfeited 'until the expiration of 30 days after the mailidg of such notice.'

Hicks vs. Ins. Co., 9 C. C. A. 215, on p. 217.

Each of the following cases fully support the doctrine announced in the foregoing cases,

Nixon vs. Ins. Co. (C. C. A.) 81 Fed. 795, 802.

Griffith vs. Ins. Co. 101 Cal. 627.

Griesemere vs. Ins. Co. 10 Wash. 202.

Ins. Co. vs. Mullen 34 S. W. 605.

Warner vs. Ins. Co. 100 Mich. 157, 159-60.

c

The Company in open court disclaimed any reliance upon or claim to have served the statutory or any other notice.

The evidence as to any notice being sent was brought out by plaintiff in error offering evidence to establish a rescission and surrender of the contract, at least this was the understanding of counsel. There was no other issue under which it was admissible. The defendant in error so understood it

as well as the court by reason of the plaintiff in error a few days prior disclaiming any intention or purpose of claiming the benefit of any notice, otherwise it would have been objected to and excluded. The disclaimer was made by plaintiff in error after mature deliberation and in the most solemn manner. We will quote fully from the bill of exceptions on page 190, 191 and 192.

"On April 23, 1895, plaintiff sued out a commission for the taking of the disposition of H. E. Duncan, Richard A. McCurdy and W. J. Easton, all officers of the defenant corporation; also for the taking of the dispositions of A. B. Forbes and Stanley Forbes. Said A. B. Forbes, from September 24, 1890, to the commencement of the suit, was general manager of said defendant company for the Pacific Coast including Washington, and Stanley Forbes during all of said time being its cashier." (The purpose of this evidence was to obtain evidence to rebut any evidence that might be offered by plaintiff in error to the effect that the statutory notice, or any kind of notice, was ever served by plaintiff in error on Mr. Phinney.) "That among the interrogatories to be propounded to said Richard A. McCurdy, also said W. J. Easton, also to H. E. Duncan, also to said A. B. Forbes, and also to said Stanley Forbes, were, among others, the following interrogatories:

"Q. State fully what from of premium notices were used, if any, by the Mutual Life Insurance Company of New York to notify the parties Insured in said company, that premiums would become due on policies issued through Pacific Coast agencies, on parties residing in the State of Washington, during the years of 1890, 1891, 1892 and 1893. If more than one form was used, state fully what each contained.

"Q. Attach to this disposition copies of each and every form of notices used as described in the preceding interrogatory during the time therein mentioned.

"That defendant's attorneys filed written exceptions

thereto on the ground that the same was incompetent, irrevalent and immaterial.

"Whereupon said defendant, by its attorneys, then stated and declared to plaintiff and said court that said defendant was not claiming to have mailed any notice to said Phinney. That it had not alleged in its answer that it had mailed any notice to said Phinney, and was not claiming and would not claim any benefit from the mailing or sending any notice to said Phinney. Whereupon relying upon the statements of said counsel, said court sustained defendant's objections and exceptions to said interrogatories and denied to plaintiff the right of having said interrogatories answered."

Record p. 190, 192.

Comment on the foregoing is unccessary. If court and counsel cannot rely upon such disclaimer and statements of counsel, then the preparation and trial of a case is a farce. No court will, in this manner, allow counsel to mislead, entrap opposing counsel in any such manner.

As we have said in the opening of this argument we have given more attention to the above point than it deserves; but the argument above made together with the authorities cited is applicable to the discussion of point number three in plaintiff in error's brief. What we have said above applies with equal force in answer to the argument of counsel on the question of waiver, abandonment and rescission of a contract, etc., etc., under point No. 6 of plaintiff in error's brief, and we ask the court to consider this argument on that proposition.

VI.

DEFENDANT IN ERROR DID PROVE HER ACTION AS ALLEGED.

Defendant in error alleged that the insured duly performed all the conditions of the contract by him to be performed.

This she proved. The payment of the first year's premium was admitted by defendant in error. No second premium was due and payable until the statutory notice was served. It was not necessary to prove the payment of any other premium until the defendant had proved that it had served the statutory notice, which it failed to do. In our pleading we follow the cases of Baxter vs. Insurance Co., 119 N.Y. 450; De Frace vs. Insurance Co., 136 N.Y. 144, and the cases of Griesemer vs. Insurance Co., 10 Wash. 202, also 212.

The discussion of the next point, No. 5, raised by plaintiff in error, will also cover this point. We will at once proceed to discuss it, and ask the court to consider all we may say thereon as a continuation of this discussion.

VII.

IT WAS NOT NECESSARY THAT DEFENDANT IN ERROR SHOULD TENDER ANY UNPAID PREMIUM BEFORE SHE COULD MAINTAIN HER ACTION.

It is admitted that the contract was made and the first premium thereon paid and that the contract was in all respects valid. The contract having once been made the same could not be forfeited except in the manner prescribed by the statute. The premiums were not due until thirty days after the service of the statutory notice. The insured fully complied with his contract when he paid such premium after the service of the statutory notice. The statutory notice was not served, consequently no second premium ever became due. Hence, the insured fully complied with

all the conditions of the contract. There is no condition in the policy requiring the executrix to pay unpaid premiums, but on the contrary the policy provides that the company may retain unpaid portion of premiums when it pays the policy. (See Record, p. 4.) The above has been fully sustained by every court that has been called upon to pass on the question. The first court to decide the question was the appellate court of New York. The pleadings were practically identical with the pleadings in this case. In fact we followed that decision believing that any court that would be called upon to construe the statute of New York would follow the decision of the highest court of that state, and more than that we believe it to be good law. The above mentioned court discusses the case very ably, and we cannot do better than quote the decision both because the decision is binding, and is also good law and discusses the question with great ability.

"The complaint alleged the delivery of this contract to the insured, his death on the 7th day of September, 1884, the presentation to the defendant of satisfactory proofs of death, according to the terms of the policy, the refusal of the defendant to pay, and that the insured had made the payments of premium according to his agreement with the defendant No issue was made by the defendant upon any of the allegations of the complaint except the averment that the insured had paid the premiums according to the terms of the policy, which it denied, and specially alleged that the premiums which became due on the 24th of August, 1884, had not been paid, (almost the identical language of the premiums in this case by both parties). * * There was no proof given at the trial by either party to show whether this notice was served or not. * * * In the absence of proof, on the part of the defendant, as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and the statute when read together. Before the defendant could raise any question in regard to the non-payment of the August premium, it was

necessary for it to show that it had complied with the statute by serving the notice, as this step was essential in order to put the insured in default, or to raise any point based on his omission to pay the last quarterly premium. * * * "It was not necessary, in order to enable the plaintiff to recover the sum insured, to pay or tender before action brought the premium that was payable on the twenty-fourth of August prior to the death of insured. If the policy was in full force when the assured died, as we think it was, that event fixed the liability and obligation of the defendant, notwithstanding the omission to make that payment. Nothing remained to be done by the widow of the insured or her asignee, except to present to the defendant the proofs of death required by the policy."

Baxter vs. Ins. Co. 119 N.Y. 450, 453-7.

In a still later case this decision was upheld by the same Court in which all the Justices concurred. The following quotation states the necessary facts:

"There is no question of pleading involved. The plaintiff was not bound to allege or prove the payment of the annual premiums when due. The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it become necessary to consider the question of the sufficiency of the notice served."

De Frace vs. Ins. Co. 136 N.Y. 144 on p. 151.

The Supreme Court of the State of Washington and the Supreme Court of Texas have both followed the above decisions of New York, as they should do, since the construction placed upon the New York statute by the highest court of New York is binding upon any other state where the statute is invoked.

Griesemer vs. Insurance Co. 10 Washington, 202.

Griesemer Administratrix vs. Insurance Co., 10 Washington, 211.

Insurance Co. vs. Mullen, (Tex.) 34 Southwestern, 605.

a

No tender was necessary because the company had denied all liability on the contract.

The evidence of plaintiff in error is to the effect that about the time the second premium became due, Mr. Phinney called to arrange for the payment of the premium by giving a short time note. That the agent informed Mr. Phinney he could not take his note but must have the money. A few days after the premium was due Mr. Phinney called to see if he could arrange about the payment of the premium, again the agent told him he must get the money. This was repeated several time within 30 days of the due date of the premium, as mentioned in the policy; at about that time Mr. Phinney tendered the premium and the agent told him the policy had been forfeited for non-payment of premium. The policy had already been entered upon the books as a forfeited policy.

After Mr. Phinney's death, his executrix informed the company of his death and asked of the company what she should do in order to obtain payment of the policy. The Insurance Company informed her that the policy had been forfeited for the non-payment of premium and denied liability on such contract.

The company having taken that attitude cannot claim that we ought to pay a premium on a policy that it had already repudiated as forfeited and void. Does the company mean to say now that it was acting in good faith; that it was trying to mislead us, and that it would have taken the pre-

miums? Surely it cannot take such a position, and if it did, this court would not permit it. It is an old maxim of the law that no court will compel a party to do an utterly useless act. The company took the position that the original contract had ceased to exist and that there was no contract. We had a right to and did assume and believe that such was its ground of defense.

The Supreme Court of Washington in a case exactly identical with this, Griesemere vs. The Mutual Life Insurance Company of New York (this same plaintiff in error), has held the foregoing to be the law. The opinion is by Mr. Justice Hoyt, as follows:

"In our opinion the question of tender in the case at bar was within this exception. It appears from the notice sent by the company upon the receipt of proofs of death, that the company entered upon the investigation of the rights of the claimant under the policy and held that they were terminated by the non-payment of the premium. And we think that enough appears to show that the company elected to stand upon the forfeiture growing out of such non-payment, and would have refused any tender of such premium. * * *

"Hence the action can be maintained without such tender having been made."

Greisemer vs. Mutual Life Insurance Co., 10 Wash. 202 on p. 210.

Griesemer Admx. vs. Mutual Life Insurance Co., 10 Wash. 211.

It is thus seen that the highest court, both of Washington and New York, has held that a tender of premium was entirely unnecessary. Defendant in error, living in the State of Washington, had a right to rely on these authorities as establishing the law of the case, and upon which she could rest with absolute confidence, one being the law of the place of contract, the other the law of the forum. This plaintiff in error was familiar with these decisions when she commenced this action. No court will tell her she was in

error in relying upon them confidently as settling the question. Would it not be doing her a great wrong and injustice to dismiss her action and compel her to tender a premium on contract that company has repudiated, and that, too, contrary to the laws of the place of contract and the forum as well.

"The proposition is thus expressed by this court at its last term in Hills v. Exchange Bank, 105 U. S., 319, as a result of the cases above cited. 'It is a general rule that when the tender of the performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unecessary when it is reasonably certain that the offer will be refused.'"

Kauffman v. Lee, 106 U. S. 196 on p. 202.

The above is fully supported by the case of United States v. Peck, 102 U. S., 64; Poindexter v. Greenhow, 114 U. S., 270-282; Lawrence v. Miller, 86 New York, 136, Insurance Co. v. Vining, 7 C. C. A. 359; Insurance Co. v. Smith (Ohio) 5 Northwestern, 417.

VIII.

THIS CONTRACT WAS NOT WAIVED, ABANDONED, OR RECINDED. THERE WAS NO EVIDENCE JUSTIFYING THE COURT'S SUBMITTING THAT QUESTION TO THE JURY.

a

It is true the court denied the instructions requested relative to the above proposition, but the court did submit it to the jury. We claim the court correctly denied the instructions and further contend that it ought not to have submitted the proposition at all, and if the court erred at all, it erred in favor of the plaintiff in error.

The contention of the plaintiff in error that this con-

tract was terminated by a waiver, abandonment or rescission of the contract is simply stating that the defense of a forfeiture or waiver of the contract in other words. It is nevertheless the same defense.

The Company never claimed an abandonment or rescission of the contract until it filed its answer in the cause. When Mr. Phinney tendered the premium, the agent of the Company refused it and informed him his contract was forfeited and of no value. Record p. 178. The Company refused the tender of his premium, not on the ground of rescission, but on the ground that the contract was forfeited. The Company instructed its agents not to receive the premium on the sole ground that the policy was forfeited. Richard A. McCurdy, the president of the Company, when asked what negotiations, if any, were had with Mr. Phinney looking towards an abandonment, rescission or waiver of his contract, answered that he did not know of any and did not know that any parties were employed or requested to obtain a rescission, etc. Record, pp. 183, 184.

Mr. Duncan, the corresponding secretary, testified to the same effect, as well as Mr. Easton, the general secretary of the Company. It was entered in the books as follows:

"Forfeited September 25th, 1891. Do not restore. Second vice president. 28th March, 1892."

Record, p.

A report was made on Mr. Phinney by their inspector of risks on January 2nd., 1892

"Financially all right. His drinking habits commented on as injurious to health. He drinks intoxicating beverages daily; not so much as to become drunk, but enough to ruin his health."

Another report, the date of which the Company did not state.

"No. 422192.

Amount, $100, 000.00

Name, Guy C. Phinney.

Residence, Seattle, Washington.

Business, President City National Bank.

Date of investigation. Forfeited.

Remarks, All right fin. but too heavy and flabby. Has taken to drinking of late and ought not to be re-instated. Awaiting particulars.

(Signed) Stark."

Record p.

When Mrs. Phinney notified the Company of the death of Mr. Phinney, they acknowledged receipt in the following words.

"We beg to advise you that policy No. 422198 on the life of the late Guy C. Phinney was forfeited September, 1891, for non-payment of premium. This policy therefore has no value."

Plaintiff's Exhibit "D", Record p. 189.

At about the same time the general agent, Mr. Pond, wrote Mrs. Phinney as follows:

"We beg to advise you that but one annual premium was paid on your husband's policy 422198 for $100,000.00 and therefore lapsed in September, 1891."

All this shows beyond any manner of question, that up to the time plaintiff in error filed its answer, it was claiming and at all times claimed that the policy was forfeited. It shows equally clearly that its defense, termed a waiver, abandonment and rescission of the contract, has no basis in

fact or never was thought of until suggested to the Company by its attorneys.

The Ninth Circuit Court of Appeals in passing upon a request for instruction which was denied in the lower court and which is similar to those plaintiff in error are insisting on as error under the above head, uses this language:

"There are several reasons why the court below was right in refusing to give this instruction. It will be sufficient to state one, and that is that is that the statute of New York prescribes the condition on which a policy may be forfeited for the non-payment of a premium. The statute is mandatory, and controls the contract. Its provisions are not liable to be set aside or waived by the company, or the assured, or by both together. Society vs. Clements, 140 U.S. 226, 233; Hicks vs. Insurance Co., 9th C. C. A., 215; Griffith vs. Insurance Co., (Cal.) 36 Pac. 113; Warner v. Association, 100 Mich., 157."

Nixon v. Ins Co., 81 Fed. 796, 802.

The following authorities clearly support the rule as announeed above:

Hicks vs. Ins. Co., 9th C. C. A., 215; Griffith vs. Ins. Co., 36 Pac. 117; Mullen vs Ins. Co., 34 S. W. 605; Ins. Co. vs. Smith, 41 S. W. 680; Rowe vs. Ins. Co. 38 N. Y. S. 625; Carter vs. Ins. Co. 110 N. Y. 15, 17 N. E. 396; Phelan vs. Ins. Co., 113 N. Y. 147, 20 N. E. 827, Baxter vs. Insurance Co., 119 N.Y. 450, 23 N. E. 1048; McDougall vs. Assurance Society, 135 N.Y. 551, 32 N. E. 251; De Frece vs. Insurance Co, 136 N.Y. 144, 32 N. E. 556.

b

The courts have universally held that this statute and like statutes cannot be waived by the insured. We have

fully covered this argument supra, but will cite some of the authorities:

Griffith vs. Ins. Co., 36 Pac. Rep. 113.

Warner vs. Ins. Co., 100 Mich , 157.

Fidelity Ins. Co. vs. Ficklin, 74 Maryland, 172 on p. 185.

Ins. Co. vs. Clements, 140 U.S., 226, on p. 234.

Wall vs. Ins. Co., 32 Fed. Rep., 273.

Reilly vs. Ins. Co., 43 Wis., 4 Dill., 177.

Chamberlin vs. Ins. Co., 55 N.H., 249.

Emery vs. Ins. Co., 52 Me., 322.

White vs. Ins. Co., 4 Dill., 177.

c

The mere non-payment of a premium on the part of the insured cannot be construed as an abandonment of the contract. The premium was not due within the meaning of the statute until the statutory notice was served.

Baxter v. Ins. Co., 119 N.Y., 450, pp. 453–457.

DeFrace vs. Ins. Co., 136 N.Y., 144.

Griesener v. Ins. Co., 10 Washington, 202.

Ins. Co. vs. Mullen (Tex.) 34 S. W., 605.

To the same effect is the case of Ins. Co. vs. Hamlin, 139 U.S., 297. Almost any number of like cases might be cited where the contract stipulates for a notice as in the case of assessment societies. We have the first case to discover where a notice is required by statute or by express provision in the con-

tract, where the failure to pay the premium without the notice has been held to be an abandonment of the contract. The proposition is so plain as a matter of law that it needs no citation of authorities in its support.

d

No right of rescission could exist in plaintiff in error except by failure of Mr. Phinney to perform his contract.

The Company could recind the contract only in case of the non-performance of the contract (the non-payment of the premium) by Mr. Phinney; but we have already shown, no premium was not due on the contract until the statutory notice was served. The plaintiff in error admitted in open court that it did not serve the statutory notice. Record p. 190-2. Under this state of facts Mr. Phinney performed every act on his part which by the terms of the contract it was his duty to perform.

e

The plaintiff in error broke the contract by not permitting Mr. Phinney to pay the premium.

Though the plaintiff in error never placed Mr. Phinney in a position where it was his duty to pay a subsequent premium, yet, according to their own witness, Mr. Phinney did tender the second premium. This is shown by the correspondence of the company about the time it claims the second premium was due, which correspondence is in the following words:

Seattle, Washington, Dec. 10th, 1891.

A. B. Forbes, Esq.,
General Agent.

Dear Sir:

Your wire of the 9th inst. reading. "If tendered, decline acceptance September premium No. 422198 Phinney" duly received. This premium was tendered a few weeks ago but was refused by me as applicant is now a very bad risk.

Yours very truly,

F. L. Stinson.

Record, p. 188.

f

The plaintiff in error not only refused the premium but instructed its agents never to take the premium.

The plaintiff in error instructed its agents by telegram from its home office in the City of New York not to permit Mr. Phinney to pay the premium or to perform that part of the contract, though it had not placed him in default by serving the statutory notice.

"If tendered decline acceptance of September premium 422198" (the number of Mr. Phinney's policy.

g

No party to a contract can rescind until he has returned or offered to return all consideration he has received under the contract.

"The rule has been thoroughly established, that before one party can rescind he must place the other in *statu quo*.

Blackburn v. Smith, 2 Exch. 783, 18 L. J. Exch. 187; Beed v. Blandford, 2 Younge & J. 278; Pharr v. Bachelor, 3 Ala. 245; State v. McCauley, 15 Cal. 458; Christy v. Arnold (Ariz.) 35 Pac. Rep. 918; Shively v. Semi-Tropic Land & W. Co. 99 Cal. 256; Cleary v. Folger, 84 Cal. 316; Moore v. Bare, 11 Iowa, 198; Murphy v. Lockwood, 21, Ill. 611; Gehr v. Hagerman, 26 Ill. 441; Wheeler v. Mather, 56 Ill. 241, 8 Am. Rep. 683; Wolf v. Deitzsch, 75 Ill. 205; Colson v. Smith, 9 Indiana 12; Chance vs. Clay County Com'rs. 5 Blackf, 441, 35 Am. Dec. 131; Hendrickson v. Hendrickson 51 Iowa, 68; Johnson vs. Jackson, 27 Miss. 498, 61 Am. Dec. 522; Randlet v. Herren, 20 N.H. 102; Getchell v. Chase, 37 N.H. 110, Ayer v. Hawkes, 11 N.H. 148; Doughten v. Camden Bldg. & L. Asso. 41 N.J. Eq. 556; Pittsburg & N. G. Turnp. Road Co. v. Com. 2 Watts, 433.

Though insisting on a rescission of the contract, the plaintiff in error does not contend that it is within the above rule of law. It does not contend that it ever returned the first premium which it admits it received. How then can it claim that the contract was rescinded, or that it ever had any to declare a rescission. It would be doing Mr. Phinney's representative an injustice to permit the Company to retain the consideration of the contract and give him no benefit therefore. This is clearly shown by some voluntary testimony of Mr. Easton, the general secretary of the Company, as follows:

"On that date, September 24th, 1891, assuming that the age of the insured was 39 years, as I understand it was, the tabular contribution of the above mentioned premium to the reserve fund of the company was $1,903.80. Taking $1,905.80 as a single premium for temporary insurance, assuming that the policy was entitled to be kept in force for a certain time

after default in payment of one premium, the period of such extension would consist of 2 years and 36 days. The extension would there expire not later than Nov. 1st, 1892."

Record, p. 336.

The date, November 1st, 1892, above, should have been November 1st, 1893. The above quotation shows that this is an error either in the printing or the transcribing of the testimony. The original premium was $3,770. Record p. 3. This was divided by the insurance Company into two parts, $1866.20 which paid for the actual cost of carrying Mr. Phinney, for one year, or until Sept. 24, 1891; and the balance $1,903.80, the legal reserve which taken as a single premium for temporary insurance, would carry the policy two years and 36 days, or until November 1st, 1893, almost two months beyond Mr. Phinney's death.

h

None of the alleged facts which the plaintiff in error claims constitutes this defense were known by it but only by a party —not the agent of the company—at least for any such purpose. A part of it was only loaned for canvassing purposes.

Much of the testimony bearing upon this defense has just been set forth. We will here add the following as bearing directly on this point.

"Q. Now, later on you went up to borrow this policy of Phinney; went up to his office to borrow this policy?

"A. I don't know that I went to his office for that purpose it came up in a general conversation.

"Q. You did borrow it there? A. Yes, sir.

"Q. And you say that later on you went to the office and borrowed this policy! A. Yes, sir.

"Q. You told him it was forfeited and it was not any good to him, or words to that effect?

"A. Words to that effect; yes, sir.

"Q. And you were well acquainted with Phinney?

"A. Yes, sir

"Q. And a good friend of yours? A. Yes, sir.

"Q. Now you did't mean to tell him an untruth?

"A. No, sir.

"Q. Well, Phinney permitted you to take the policy?

"A. Yes, sir.

"Q. Did you ever return it to him?

"A. Not to my knowledge; I don't remember that I did.

"Q. What became of this policy? A. I don't know.

"Q. You havn't got it now? A. No.

"Q. You say that Phinney let you have this policy for canvassing purposes? A. Yes, sir.

"Q. You would not care to have a dead policy for canvassing purposes would you? A. It would not make any difference whether it was dead or alive.

"Q. You would not want to say that Phinney has a policy issued for a hundred thousand and it was such an expensive contract.

"A. That is part I should not state if I was canvassing. I show the contract.

"Q. For the purpose of soliciting you would let them understand that it was a live policy? A. Yes, sir.

We have already called the court's attention to the fact that the president of the Company, Mr. McCurdy, (Record, p. 183-4) the corresponding secretary of the Company, Mr.

Duncan, (Record, 310) and the general secretary of the Company, Mr. Easton, (Record, p. 328) all swore that they did not know Mr. Stinson; that he was not the agent of the Company, and had no connection with the Company. Of course plaintiff in error claims this is not true. It undoubtedly is true to the extent that he was not an agent with any general powers whatsoever. It is true they designated him as the agent upon whom summons might be served in the State of Washington, in conformity with the statute, and he was soliciting insurance. A clause in the policy reads as follows:

"Notice to the Holder of this Policy—No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy."

There is no evidence that any of the above conversations were ever reported to the Company, or that they were informed that Mr. Phinney had loaned the policy to Mr. Stinson for canvassing purposes, or that the Company had knowledge of the facts other than the non-payment of a premium which it now claims as the basis of a waiver, rescission or surrender of policy.

It appears therefrom that the Company had not made any effort to secure a cancellation or surrender of the contract of insurance. That no negotiations were had with that end in view. The company had no knowledge of any of the facts which it now claims constitute a waiver, abandonment, recission or surrender of the contract. Mr. Stinson of Seattle alone had knowledge of these. The Company itself disowns Stinson, maintains that he was not its agent, and disclaims that he was employed to act in any

capacity for it. If this is true, and they say it is, his knowledge would not be their knowledge, and his act would not be their act. Not having any knowledge of such facts it could not act upon them. If the policy was given at all to Stinson it was given to him to be used for canvassing purposes—to him as a friend and individual, not for the Company. If it was given at all it was given for that purpose and no other. The contract itself contained a condition that has much bearing upon this point, which is as follows:

i

It is claimed that after the Company refused Mr. Phinney's tender of the premium, and had instructed its agent by a telegram from the home office not to accept the premium, that its agent secured an admission that the policy was forfeited, and that this constituted a waiver of the statutory notice.

This is directly contrary to the express terms and spirit of the statute, to the effect that a printed notice must be served before the policy could be terminated We have shown that all courts have held that the defense of forfeiture or waiver of forfeiture or anything akin to forfeiture was of no effect or force if there has been any departure from the strict terms or mode of forfeiture provided by statute. As soon as any other mode is recognized the statute is worthless to avoid the evil it was intended to cure. We are strictly within all the decisions of all the court when we say that the statute provided one method and one method only for forfeiting a contract of insurance and for proving such forfeiture. No other method of proof is recognized by

the statute. No other reason for this rule need be stated. It is sufficient to say, if we are right in saying it, that this is the sole method provided by statute, and there is every reason why the legislature should adopt such a rule. It doubtless recognized the fact that the party who would receive this notice, whenever the question arose, in most instances at least, would be dead; and if it permitted an insurance company, or the representative of an insurance company, to give evidence of a conversation with the insured it would be opening the door to the practice of fraud. There would be no way of meeting the evidence offered by the insurance company, because the party with whom such conversation was had would be dead and gone and the interest of the insured would be wholly at the mercy of the insurance agent. And even if the insured was alive at the time such a question arose, and it permitted an oral notice to be given, or permitted statements made orally to take the place of of the written notice, it would leave it in the hands of the insurance company to intentionally or unintentionally misrepresent what occurred; but if it required the company to given a written or printed notice containing such information, giving the insured thirty days to pay after the receipt of such notice, it left nothing to the frail recollection of the insurance agent; no misunderstanding could occur—no one could be misled. It is useless to suggest to a court of ripe experience in such matters that it was a wise precaution, and that its provisions ought not to be lightly set aside.

If Mr. Phinney admitted the policy was forfeited it was because he was ignorant of this statute of New York—ignorant of a fact—which admission would not bind him. This fact the plaintiff in error is conclusively presumed being the laws of its home state.

Mr. Pomeroy lays down the same rule: That "Mistake

of law constitutes a mistake, only when it arises from: 1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or, 2. A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify. *Mistake of foreign law is a mistake of fact.*."

Pomeroy, Eq. Jur, vol. II. sec. 839 on p. 300.

The leading authority on this part is a case decided by the Supreme Court of Massachusetts, and is in part as follows:

"That a mistake in fact, is a ground of repititon, is too clear and too well settled to require argument or authority in its support. * * * * The courts of this state are not presumed to know the laws of other states, or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them.

That the lex loci rei sitae must govern the descent of real estate, is a principle of our law, with which everyone is presumed to be acquainted. But what the lex loci is, the court can only learn from proof abduced before them. The parties knew, in fact, that the intestate died seized of estate situated in the State of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But they are bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proofs, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? Juris ignorantia est cum jus nostrum ignoramus, and does not extend to foreign laws or the statutes of other states.

We are of the opinion that, in relation to the question

now before us, the statute of New York is to be considered as a fact, the ignorance of which may be ground of repetition."

Haven vs. Foster, 9th Pickering, 112, on p. 129-130.

The Supreme Court of Washington has followed the above authorities using this language:

"But there is another principle of law which is conclusive in this case. The demurrer admits the fact that Bell was not a resident of the State of Washington, but of the State of Ohio, when this contract was made, and his mistake of the laws of this state is held to be a mistake of fact. Nor does the maxim that 'ignorance of law is no excuse of the breach for non-performance of an agreement' apply to foreign laws, or laws of other states of the Union. Ignorance of those laws is deemed to be ignorance of fact. King vs. Doolittle, 38 Tenn. 77. Ignorance of law signifies ignorance of the laws of one's own country, not ignorance of the laws of a foreign country. In this respect the laws of other states in the Union are foreign laws. Haven vs. Foster, 8 Pick. 111. To the same effect is Patterson vs. Bloomer, 35 Conn. 57; Raynham vs. Canton, 3 Pick. 293; Bank of Chillicothe vs. Dodge, 8 Barb. 233.

Morgan vs. Bell, 3 Wash., 554 on p. 576.

To the same effect are the following:

King vs. Doolittle, 38 Tenn. 77.

Samson vs. Mudge, 13 Fed. 260.

Norton vs. Marden, 15 Me. 45.

Patterson vs. Bloomer, 35 Conn. 57.

I. Story, Eq. Jur., Sec. 3rd, note 3.

Chilcotte vs. Dodge, 8 Barb. 233.

It would be a strange law that under these circumstances would hold an omission of forfeiture of any effect or force

against Mr. Phinney or his executrix. Mr. Phinney had evidently been and was very anxious to keep the policy alive.

Indeed, during this very transaction made an unsuccessfull attempt to increase his insurance by obtaining a policy in the Equitable, of which the agent was aware Without being placed in default he had tendered the premium. On the other hand the company was equally anxious that his policy should be terminated. The agent wrote the company he was a bad risk, and he had refused the tender of his premium. The company took the position at once that the policy had been forfeited the preceding September, and maintained that one position until long afterwards and up to the time it filed its answer in this case. In other words if the company was permitted to take this position and could successfully maintain it, it would reap the the benefit of its own fraud. Can there be any doubt (giving for the time being full credence to the evidence of plaintiff in error) that had Mr. Phinney known this policy was preserved intact by the law of New York he would never have admitted his policy was forfeited? His whole conduct showing as it does that he was anxious to keep it alive. Is it not clear that if he ever admitted the policy was forfeited that he did it because of his ignorance of the law of New York?—ignorance of a fact, which would not bind him or his executrix as soon as the mistake was discovered? Is it not clear that this mistake of fact was superinduced by plaintiff in error working through an agent who claimed to be his friend, and who assured him the policy was forfeited.

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Mr. Phinney's executrix was not estopped from enforceing the contract. All the argument advanced by plaintiff in error to sustain the defense of waiver, abandonment and rescission is based on estoppel.

All the text writers agree that to establish the estoppel suggested by these requested instructions all the following elements must appear:

"1. There must have been false representation or a concealment of material facts.

"1. The representation must have been made with knowledge, actual or virtual, of the facts.

"3 The party to whom it was made must have been ignorant, actually and permissably, of the truth of the matter.

"4. It must have been made with the intention, actual or virtual, that the other party should act upon it.

"5. The other party must have been induced to act upon it. Bigelow on Estoppel, p. 570; Pomeroy, Eq. of Jur., 1st ed., sec. 805; Bacon on Ins., 2nd ed., sec. 420; May on Ins., 3rd ed., sec. 507, and case cited by the above authorities.

1. The above evidence shows clearly that Mr. Phinney did not conceal a material fact or make any misrepresentation. On the contrary the company did mislead Mr. Phinney. It told him his contract was forfeited when it knew it was not. It knew it had not served the statutory notice. It knew Mr. Phinney was ignorant of the statute as well as his rights under it.

2. Mr. Phinney did not make any representation of any fact. The company did all this.

3. The company was not ignorant of the facts. It knew the law of its own domicile. It knew it had not complied with the laws regulating forfeiture of such contracts. It knew Mr. Phinney was ignorant of the law and his rights under it. The law presumed he was ignorant of the law of New York: "Mistake of the law of another state is a mistake of fact." Pomeroy Eq. Jur. Sec. 839; Hoven vs. Foster, 9 Pick. 115.

4. As Mr. Phinney did not make any representation he did not deceive, and could not have had any intention to deceive.

5. Did the company act on any representation that Mr. Phinney made, or anything Mr. Phinney said, or anything Mr. Phinney refrained from doing? It certainly did not. The above evidence shows that on the 24th of September, 1891, the Company declared the policy forfeited. On or about Oct. 24, 1891, when Mr. Phinney tendered the premium it told him his policy was already forfeited. On December 10, 1891, without Mr. Phinney doing anything further or saying anything further after the tender, the Company telegraphed their agents not to accept Mr. Phinney's premium if tendered. If that telegram means anything it means that the company, on the day the telegram was sent, December 10, 1891, was standing on the ground that the policy had already been forfeited on September 24, 1891. The evidence clearly shows that it maintained that position, and that position alone, during the whole of Mr. Phinney's life, and long after this action was instituted. On January 28, 1892, the inspector of risks, Mr. Stark, in a report he made, reported adversely on Mr. Phinney as a risk, and ends this report with the very significant words "awaiting particulars."

On the 28th day of March, 1892, the second vice-president made an entry in the books of the company that the policy was "forfeited September 24, 1891, do not restore." When Mrs. Phinney informed them of the death of Mr. Phinney, and demanded payment of the policy, they replied it had been forfeited September 24, 1891, for non-payment of premium. The agent at Seattle wrote her to the same effect at about the same time. With full knowledge of all the facts all this time it took and maintained the position that it

was forfeited September 24, 1891. It maintained that position successfully against Mr. Phinney's tender of the premium. Would it have done differently if Mr. Phinney had declared to them the policy was still alive? Would it have sent him a notice, statutory notice, informing him that if he did not pay within 30 days from the service of the notice his policy would be forfeited, but that if he did pay within 30 days it would be taken in full compliance with the terms of his contract? It would not because that was the one thing it was making efforts to avoid. The telegram refutes any such contention. The telegram shows that they were exceedingly anxious to keep him ignorant of his rights and prevent his payment of the premium, and that they would not accept it on any terms, relying on their contention that it was already forfeited. It was seeking to prevent the payment of the premium, not its collection. If the Company were relying in the slightest on this alleged abandonment, rescission or surrender, why not some mention of it in all the correspondence between it and its agents? Why not some mention of it in its books or records? Would an actual bona fide surrender of so valuable a contract as $100,000 which it was anxious to have terminated be made and no record of it anywhere, and all the head officers be entirely ignorant of it? None of the officers in New York knew anything about it, nor the general agent who "had charge of all matters in the west?" He never heard of it. The only one who did know anything about it was a Mr. Stinson, of Seattle, who in the language of the president, had no relation whatever with the company, and did not in any manner represent it. Estoppel or waiver is founded upon deceit, and has its adjustification in the duty of the courts to prevent the accomplishmet of fraud. In all cases cited, and in all the

cases where the word is used that we have been able to find, in which the defence was estoppel, all the five elements above stated were present. Estoppel or its synonyms in law, abandonment, and waiver, are based on principals of equity in order to prevent one party from committing fraud upon another. To permit this defense to succeed would not only fail to prevent fraud but give the insurance Company the benefit of its fraud. As we have already said the company in this case was the party guilty of deceit, of false representation, and it did this knowing it was not speaking the truth, and with the intent to deceive. If Mr. Phinney ever did admit the policy was forfeited, his admission was brought about by their representation that the policy was forfeited, and by concealing from him the information that the State of New York required to be given by the printed notice. This statute was enacted to protect the policy holder. It effected a radical change in the ordinary contract of insurance. It presumed that the policy holder would be ignorant of the change it wrought and the benefit its conferred. It required the notice to be sent to policy holders which recited all the changes the statute enacted, and the rights it conferred.

Mr. Phinney very naturally would suppose his policy was issued in accordance with the laws of New York, not in defiance of them. If he examined his policy, which he is presumed to have done, he would have found by its provisions that it was forfeited on the day the premium was due, if it remained unpaid on that day. The policy itself was misleading, the company assuming therein the power to forfeit the contract contrary to the statute. Under these facts, under the law, it was the duty of the company to speak, to send the statutory notice which would give the

assured the knowledge of his right under the statute. Instead of that the company sent a party (a friend, too, of Mr. Pinney's) whom in one breath they say is their agent, and in the next say he is not, who insisted and contended that the policy was forfeited. This party being an expert in insurance matters, and being a friend of Mr. Phinney's as well, claims he succeeded in convincing Mr. Phinney that the policy was forfeited, and obtained an admission of that fact. The company knew that this statement was false. Mr. Phinney was surely ignorant of the law of New York which saved his policy for him This law presumed he would be ignorant of it.

The following quotations from decisions correctly state the rule.

"There is no question, of course, but that a court of equity cannot grant relief solely upon a mistake of law. But there was here more than a mistake. There was a surrender of legal rights intentionally induced and procured by a false representation as to the law governing the case. The defendant must be presumed to have known that it was liable for the whole loss and by falsely representing that under the law applicable to the case the policy was void, when in fact it was valid, it induced the plaintiff to rely upon the superior knowledge that it possessed upon the subject and to surrender to it his claim.

"This clearly constitutes fraud and there would be manifest injustice in upholding a settlement under such circumstances."

Berry vs. Ins. Co. 132 N. Y. 59 on p. 53-4.

Justice Elmer, in Phillipsburg Bank vs. Fulmer, 2 Vr. 55, said: "To constitute an estoppel in pais there must be an admission intended to influence, or of such a nature as will naturally influence, the conduct of another, and so change his condition as materially to injure him if the party making it is allowed to retract."

"The main purpose of the doctrine is to prevent fraud;

there can, therefore, be no estoppel without fraud, either actual or legal. Hence, to impart this virtue to a representation, it must be made by a person with knowledge of the truth, or, what is the same thing in legal ethics, by a person whose duty it is to know the truth, to one who is ignorant of it. And he must make it with the intention of influencing the conduct of another, or under such circumstances as to show that he had reason to believe, when he made it, that it would influence the conduct of another. Kuhl vs. Jersey City S. C. E. Gr. 84. He who seeks to take advantage of an estoppel, must show that he has been misled by the works or conduct of another."

Ins. Co. vs. Morris 31 N. J. Eq. 503.

"No person can be said to have waived his rights unless he understands that he is waiving them."

Kirby vs. Ins. Co., 13 Lea. (Tenn) 340 on p. 344.

To the lower effect are:

Berry vs. Ins. Co. 132 N. Y. 49 on p. 53-4.

Sanford vs. Stone 40 Pac. 609 on p. 614.

Ramsey vs. 64 Tex. 397.

Pomeroy Eq. Jur. 2 vol. sec, 812, 846, 847.

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If there is any evidence of estoppel it is against plaintiff in error and in favor of defendant in error.

The evidence shows that about ten days before the premium was due, Mr. Phinney called at the office of the Company to arrange for the payment of his premium. He requested the Company to accept his note for thirty or sixty days. That the agent refused to accept his note and requested him to get the cash. That he called a couple of days before it was due and again requested the agent to take his notes, but the agent informed him he could not do so, but asked him to get

the money. That he called again after the premium was due and a like conversation occurred. That he repeated this so many times within thirty days that the agent could not state the number, each time, the agent saying he should get the money. That finally he tendered the premium and the agent informed him for the first time that he could not accept the money without a certificate of heaith. Yet for thirty days after the premium was due he at all times led Mr. Phinney to believe that if he would secure the money he would deliver him the Company's receipt, never suggesting during that time that it would be also necessary for him to furnish a certificate of health. Both the agent and Mr. Phinney knew during this whole period that if a certificate of health was required Mr. Phinney could not furnish one. The agent wrote the Company about this time that Mr. Phinney had tendered the premium but that he had declined it on account of ill health, as Mr. Phinney was then a very bad risk. Fair treatment, honest dealing would have required the company to inform Mr. Phinney, after the alleged forfeiture, that it was no use to secure the money to pay the premium as his health would not permit his restoration. It is a rule of law too well settled to need citation that if a company recognized a policy as a continuing one after the right to declare a forfeiture exists it will be held to have waived such forfeiture. This the company did when it requested Mr. Phinney to get the "cash" to pay the premium, after the date of the alleged forfeiture.

IX.

IF THERE WAS ANY EVIDENCE TENDING TO SHOW AN ESTOPPEL, WAIVER, ABANDONMENT, OR RESCISSION AND SURRENDER OF THE CONTRACT, THESE MATTERS WERE SUBMITTED TO THE JURY, UNDER PROPER INSTRUCTIONS, AND THEIR VERDICT IS CONCLUSIVE.

We are sanguine that the defense of waiver, abandonment, rescission and surrender was wholly unsupported by the testimony and should have been withdrawn, by the court, from the consideration of the jury, but if our judgment is in fault in this respect, the plaintiff in error was certainly not prejudiced by the course pursued below.

The court below was of the opinion that the issue thus raised was a proper question for the jury to decide, and submitted the same and instructed specifically on the point. We submit that the instruction (if there was any evidence justifying its submission at all) is lucid, fair, comprehensive and impartial, and correctly states the law. The portion of the charge criticised by counsel for plaintiff in error embraces only a small part of the instructions on the point, and while we believe even this segregated portion accurately states the law, it is an elementry rule that a charge must be construed as an entirety, and when the completed charge on this point is considered it will be found that the lower court is not open to any criticism in this instance.

The entire charge on this point is as follows:

"Now, it is contended that Mr. Phinney and this company, acting through Mr. Stinson as its agent, arrived at an understanding and agreement that the policy should not continue longer in force; Phinney was to pay no more money, and that his rights and the policy were abrogated. Notwithstanding the provision of the statute of New York, that a provision in the policy itself waiving notice has no effect, and that the company can only forfeit the policy for non-payment of premium by mailing the prescribed notice, still it would be

competent and it was competent for the parties mutually to agree to the cancellation of a life insurance policy if they saw fit to do so. And the evidence in this case shows that Mr. Phinney did voluntarily, without being led by false representation or deceit to give up the policy, rescind the contract and give up the policy rather than to continue to pay the premiums provided for in the policy, that agreement would have the effect to terminate this policy so that it would no longer be a continuing contract. There is testimony in the case tending to prove that Mr. Phinney was unable to meet the second payment when it fell due, and by reason of his failure to make that payment, he voluntarily delivered up the policy to Mr. Stinson as an agent of the company, with the understanding expressed at any time, that it was lapsed, that it was no longer a continuing contract in his favor. If there was a full and fair understanding between these two men in that matter, and each relied upon that understanding, it would have the effect to determine the policy, and the company would have the right to consider itself absolved from any obligation to give the statutory notice in order to forfeit the policy because it would be unnecessary for the company to forfeit by legal proceedings what the opposite party had voluntarily relinquished. It is a question of fact, therefore, for you to determine from the evidence in the case, whether there was a full complete understanding and meeting of minds between Mr. Phinney and Mr. Stinson, and such an agreement and understanding entered into between them, whether the policy was surrendered and delivered up to Mr. Stinson, with that understanding and whether relying upon that understanding the defendant company subsequently acted."

Record, p. 352 and 354.

X.

PLAINTIFF IN ERROR REQUESTED THE COURT TO REPEAT THE VERY CHARGE OF WHICH IT NOW COMPLAINS, AND THUS MADE THE COURT'S CHARGE ITS CHARGE.

After the court had instructed the jury, and after each party had taken his exceptions, the jury retired to consider

its verdict. Thereafter it returned into court for further instructions in the form of questions, and asked the court with reference to the abrogation of the contract. The court thereupon answered the jury's questions, and thereupon counsel for plaintiff in error requested the court "to modify the instructions embodied in the jury's questions and the court's answer by a substantial repetition by the court to the jury of the instructions, which the court had heretofore given in regard to the abrogation of the contract of insurance, by agreement between the agent and the insurance." And it excepted to the refusal of the court to repeat the instruction of which it now complains. Record, p. 358, under Exception No. 35.

The categorical answers of the court to the further instructions requested by the jury, being clear, incisive and brief, were calculated to be easily retained in the memory of the jury. Counsel for plaintiff in error conceiving that it placed their client in an unenviable position, concluded to waive and abandon the exceptions theretofore taken to the court, and elected to adopt the instruction of the court as the child of its own creation, and theretofore, in open court solemnly requested that the first charge of the court be substantially repeated.

We submit that counsel could not have selected any more appropriate way of expressing its entire approbation of the charge than to have requested its repetition. The court proceeding upon the theory that a jury composed of men possessing the intelligence to frame the questions that they prepared and submitted to it, could be relied on to remember the instructions first given, refused to indulge in the idle ceremony of repetition. This affords no cause of complaint and cannot avail plaintiff in error. Counsel have

not the liberty in one breath to take exception to a charge and refusal to give requested instructions, and in the next breath and after further deliberation to request the court to repeat a charge and then say they were harmed by the charge given. Their exceptions were vague and general but their request to repeat was specific. It told the court as plainly as language could, that its first charge, in connection with its answer to the jury's question, was satisfactory to counsel. It claims now, that the charge with reference to the abrogation of the contract did it grievous harm. If that is true, would the court's repetition of it make it less grievous? Is it not clear that the charge as given was quite satisfactory to it until the jury brought in an adverse verdict?

CONCLUSION.

In the foregoing brief we think we have shown that the law of the case is overwhelmingly with the defendant in error. The plaintiff claims and insists that the second premium was not paid and that defendant in error is now seeking to enforce a contract that in good conscience she is not entitled to, because of the alleged failure to pay the second premium. We have discussed this case on the theory that plaintiff in error's contention is correct, though we have shown in our opening statement that there is much to show that in fact it was paid at the time the policy was procured. But still, admitting their evidence to be true, whose fault was it that the Company did not get the second premium? Did it ask it of Mr. Phinney in vain? Did he refuse to pay it? No. The only reason the Company did not get the premium is because it would not accept it. The agent wrote the Company that Mr. Phin-

ney "offered to pay, but in ill health". Later on he writes the Company, "This premium (Mr. Phinney's) was tendered a few weeks ago, but was refused by me, as applicant is now a very bad risk."

The home office instructed its agents by telegram, (could not wait for the slow carriage of the message by the mail,) "If tendered, decline acceptance September premium No. 422198 Phinney." Again we ask, whose fault was it that the Company did not receive the premium? This correspondence reveals that it was not seeking the premium, but was bending every effort to prevent Mr. Phinney from paying it, and was doing all within its power to obtain a forfeitmre of the contract. This is still more clearly shown by its subsequent conduct. About a month after it sent the above telegram its agent reported as follows:

"Date of investigation, Jan. 22, 1892.

"Remarks.

"Financially all right. He is growing very heavy and flabby. His drinking habits are commented upon as injurious to health. He drinks intoxicating beverages daily, not so much as to become drunk, but enough to ruin his health.

"(Signed) STARK.

"Remarks:

"All right fin. but too heavy and flabby. Has taken to drinking of late, and ought not to be reinstated.

"(Signed) STARK.

"Awaiting particulars.

"A. *I produce here a book of the company, and the entries therein are as follows: 'Forfeited September 25th, 1891. Do not restore, second vice president, March, 1892.'*"

The plaintiff in error has not made and does not make any explanation of the above. It cannot be explained up-

on any other theory than that the Company was exceedingly anxious to obtain a forfeiture of the contract, and was not willing to accept the premium under any circumstances. The Company was aware that Mr. Phinney's days were few. It had its finger on his pulse, and it was beating slow and weak. The Company knew that if they accepted the premium, the whole policy would probably soon mature. They were much alarmed lest the agent should overlook the fact that Mr. Phinney was a bad risk and might give a few hours grace to save the forfeiture of his policy, which Mr. Phinney prized highly. His application for more insurance had just been denied on account of his physical condition, and he was anxious to keep his policy in force. They cut him off short without notice or warning, directly in the teeth of and contrary to the statute. They telegraphed their agent across the continent not to take the premium under any circumstances, and the agent triumphantly comes back with the answer that he has already refused it. It was to prevent such conduct that the statute was enacted, and it is of little avail if such defense can succeed. "Forfeitures are odious; they are often the means of great injustice and oppression, and courts will only enforce them when necessary."

It would have been a rank injustice had the company acomplished its object in attempting to forfeit the contract; but in its zeal and hurry to forfeit the contract, it overstepped itself in failing to comply with the New York statute, which was intended to acomplish this very object—prevent a forfeiture without timely notice and warning.

We mention that the decision of the circuit court of appeals dismissing the writ should be affirmed, and if this

Court should hold against us on that proposition, then the judgment of the circuit court should be affirmed.

Respectfully submitted,

STANTON WARBURTON,

Attorney for Defendant in Error,

A. F. BURLEIGH,

of Counsel.

No. 12.
Sup. Brf. of Warburton.

Filed Jan. 30, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 12.

THE MUTUAL LIFE INSURANCE COMPANY,
PETITIONER,

vs.

NELLIE PHINNEY, AS EXECUTRIX, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF.

S. WARBURTON,
Attorney for Defendant in Error.

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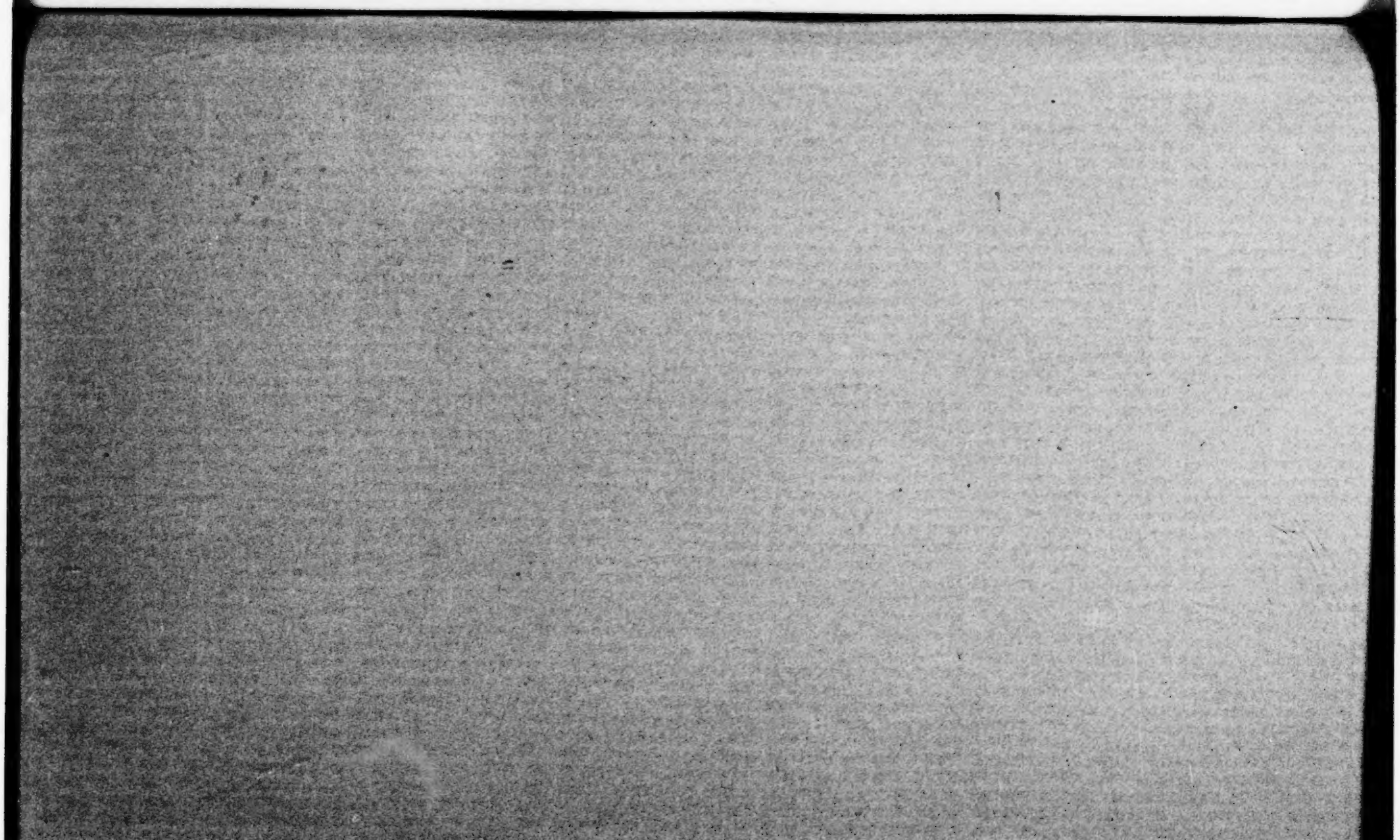

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Defendant in error, about one year ago, at or near the time the case should have been called for argument had it not been continued, filed her original brief in this cause. The plaintiff in error has, in the last day or two, served its brief. To answer more fully some of the points discussed therein, and in order to give the court the benefit of some of the decisions announced since the printing of the former brief, the defendant in error files this her supplemental brief.

The statute of New York is a limitation on the powers of insurance companies organized by the State of New York.

We have argued the above question at length in the original brief. In view of the contention of the plaintiff in error that the highest court of New York has not decided that the statute of New York requires companies to send notices to non-residents of New York, and has not in effect decided that the said statute is a limitation on the power of the corporations of that State, I have examined the record of the case in Baxter *vs.* Ins. Co. in the office of the clerk of that court in Albany. We find their contention is not sustained by the record. In that case one Matteson, the insured, was a resident of the State of Pennsylvania for ten years prior to his death. While a resident of Pennsylvania, in 1884, he took out a policy of insurance in the Brooklyn Life Insurance Co. The policy was payable to his wife. Subsequently he died in the State of Pennsylvania. After his death his wife assigned the policy to one Baxter, presumably a resident of New York, between whom and the company a controversy arose over the policy. The company claimed the policy was forfeited by Mr. Matteson in his lifetime, on account of the non-payment of a certain premium. There was no proof offered by either party as to the service of the statutory notice, Mr. Baxter claiming that under this statute it was not necessary for him to prove that the company failed to serve the notice on Mr. Matteson, the company contending that it was. The court held that it was incumbent on the company to prove the service of this notice on Mr. Matteson, a resident of Pennsylvania, as a condition precedent to its right to defend on the ground of the forfeiture of the contract for non-payment of the stipulated premium. In so deciding the court uses this language:

"The policy itself contained the stipulation that it was a contract made and to be executed in the State of New

York, and construed only according to the laws of that State. Aside from the provisions of the policy and under the general rules of law, the contract was subject to the terms and conditions expressed in chapter 341 of the Laws of 1876, as amended by chapter 321 of the Laws of 1877. This statute was a part of the contract in question, and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all of its terms and conditions had been actually incorporated into the policy."

Baxter *vs.* Insurance Company, 119th New York, 450.

We have printed as an appendix to this brief the record certified to by the clerk of the court of appeals. The court does not base its decision on the ground that the insured was a resident of New York. It could not, because Mr. Matteson was a non-resident, but based its decision on two grounds: 1. That the policy contained a clause to the effect that it should be construed and controlled by the laws of New York, just as the contract in this case does. 2. That even though that stipulation was not in the contract, the general principle we are contending for would prevail. In the face of this decision, how can counsel contend that the highest court of New York has not held that it was necessary to send the statutory notice to non-resident policyholders. This case alone meets fully the main argument of defendant in error for reversal.

The court of appeals of New York in the case of Carter *vs.* Ins. Co., 110 N. Y., 15, also held that a notice should be served on a resident and citizen of Georgia, the insurance company being chartered by the State of New York. Ordinarily, when controversies arise between New York corporations and residents and citizens of other States, they are settled either by the courts of the State wherein the citizen lives or by the United States courts holding terms in such State; but here are two leading cases where the application of this statute is in question, both holding it necessary to send notices to non-residents of New York.

The appellate court of Illinois in an elaborate opinion has recently held that the statute of New York is a limitation on the power of insurance corporations chartered by that State. The same contention was made by the insurance company in that case as this. The court says:

"Appellant's counsel contend, first, that the contract was consummated in this State, and therefore that the New York statute has no application; and, secondly, that even though it be conceded that the statute applies, the policy was declared forfeited in conformity with its requirements. The argument of appellant's counsel on the first proposition consists of the discussion of the question whether the contract of insurance is a New York or an Illinois contract, apparently assuming that if it is the latter the New York statute can have no application, it not being a part of the contract and the contract making no reference to it. In this assumption we cannot concur. The question is one of power in the appellant corporation, namely, whether it had power to declare the policy forfeited otherwise than as prescribed by the New York statute. The validity of the statute is not questioned, nor is it questioned that appellant did business in New York or that the policy is such as is within the prohibition of the statute."

The court then discusses the question at great length as to whether or not this statute is a limitation on the power of the corporation. It shows, by reason and in entire accord with the great weight of authority, that such is the case. We ask the court's most careful attention to this case. It discusses the question fully, and in a most able manner, it closes the discussion in these words:

"Our opinion being that the appellant is, by reason of the New York statute, powerless to declare a policy of insurance forfeited, otherwise than as therein prescribed, and that irrespective of the question whether the policy is a New York or an Illinois contract, a decision of the latter question is unnecessary. However, inasmuch as the application was forwarded to New York and there accepted, and the policy was there issued and returned to Chicago for de-

livery, and the premiums and the amount issued were, by the policy, expressly made payable in New York, authorities are not wanting in support of the proposition that New York is to be regarded as the place of the contract (Phinney *vs.* Mutual Life Ins. Co., 67 Fed. Rep., 493)."

Equitable Ins. Co. *vs.* Frommhold, 75 Ill., app. 43.

To the same effect is recent decision from California supreme court as follows:

"It is also claimed on the part of the appellant that there was a waiver of the notice by the plaintiff. There is nothing in the case to show a waiver. Besides, it has been held by the court in the case of Griffith *vs.* Insurance Co., 101 Cal., 627; 36 Pac., 113, that under the law in question in the State of New York, a forfeiture could only occur in the mode pointed out by such law.

"The statute in question is regarded as indicative of the legislative will that, as a matter of public policy, life insurance companies should be deprived of the power to declare policies forfeited for non-payment of premiums, except in the prescribed mode, and that, being deprived of the power so to do, a waiver on the part of the insured cannot be construed to confer such power, in the face of the law which has taken it away. The reasons for such a policy are so numerous and obvious that it is not deemed necessary to occupy time and space in specifying them."

Osborne *vs.* Home Life Ins. Co., 56 Pac. R., 616.

If the statute of New York cannot be waived by written stipulation. For the same reasons, and they apply with far greater force, it cannot be waived indirectly. No other method can be substituted for that provided by the statute.

The above proposition has been argued at considerable length in our original brief. We wish to add a little to the discussion therein contained. We think we have shown clearly, both by authority and by reason, that the statute cannot be waived in writing. And if not in writing, how otherwise? Does not the old mathematical as well as logical

rule that the greater includes the less still prevail? If the parties to the contract of insurance cannot agree in writing to waive a statute of New York—where there could be no misunderstanding as to what the agreement would contain, where the agreement could be open to but one construction, where there could be no doubt as to the intention of the parties, where the insured could not suffer from the willful or false testimony of the agent of the insurer as to what the actual agreement was, where, in event that the insured should die, the agent of the insurer could not testify away the rights of the representatives of the insured, where perjury or willful misrepresentation as to what occurred could not prevail—by what course of reasoning or logic can it be said that the parties can waive the statute orally? Where there may be a misunderstanding as to the actual agreement, where either party may go on the witness stand and give different versions of what was actually agreed upon, where one of the parties interested may willfully misrepresent the true agreement as it may affect his interest, and where to that extent there will be a reward for any perjury he may commit—where, in case of the death of the insured his representatives will be wholly at the mercy of the agent of the insurance companies. If it was wise and was the intent of the legislature to make it impossible for the parties by solemn agreement in writing to waive the statute on the ground of public policy, was it not still greater wisdom, and was it not the intent of the legislature to take from the parties the power of making an oral agreement which would be subject to far greater abuse? If the insured cannot waive the service of the notice in writing, and such an attempted waiver is void, then of course no estoppel can be based on such a void agreement, because the insurer could not be misled by an agreement which he was bound to know was void. He could not rely upon any such agreement. It could not be made with intent to deceive, and for the same reasons

the insurer could have no right to act or rely upon it. This being true, there is nothing upon which an estoppel can be based. Then it must follow, as night follows day, if estoppel cannot be based on the solemn declaration or agreement in writing, it cannot be based on any oral declaration or agreement.

We think no one can read the statute carefully, especially in light of the decisions upon it, or like statutes, but he will at once conclude that it was the intention of the legislature in enacting this law to establish by it a definite, fixed, and absolute rule for the forfeiture of insurance contracts; one that would be universal and not subject to be set aside; one that would enable the insurance company to enforce the forfeiture feature in entire accordance with the terms of the contract, making the method of service easy and proof of the service equally easy and simple. But, on the other hand, it made this method mandatory and exclusive. It took great pains in framing the provisions of the act to guard against any possible evasion of any of the rights and privileges conferred upon the insured by the act: (*a*) The notice must be in writing, not oral; (*b*), it must name the amount of the premium and the date of its payment; (*c*) it must contain words of warning; (*d*) it must be addressed at the last known post-office address; (*e*) it must have the postage prepaid; (*f*) it must give insured at least thirty days in which to prepare for and pay the premium. None of these things may be evaded. This notice may be served before or after due date named in the policy, but one or the other notice must be served, and—

"In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; *but no such policy shall in any case be forfeited* or *declared forfeited* or *lapsed* until the expiration of thirty days after the mailing of such notice." (See act.)

Such is the language of the act. If the *policy shall not be forfeited* or *declared forfeited* until thirty days after the service of the notice, could the admission of the insured that his policy was forfeited work that event? Can such an admission change the fact, it being admitted no notice was served? Could the insurance company claim it relied on such admission when it was bound to know that such admission was contrary to the fact. Such is not the decisions of the courts of New York.

"It is to be noticed that the statute not only says that no company shall declare a policy forfeited, but that no policy shall be forfeited. The allegation, therefore, not only lies as a basis of the declaration of the forfeiture, but the existence of the service of the notice is the foundation of the right to forfeit, and, for that reason, proof of it is absolutely essential. Under the statute as it then existed, therefore, it was not necessary for the plaintiff to prove the payment of the premiums, and proof that they were not paid would not establish the forfeiture of the policy, because, by the express provisions of the statute, the failure to pay the premium does not forfeit the policy."

Fischer *vs.* Ins. Co., 56 N. Y., § 262.

"The condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to pay the premium within thirty days after notice. The statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium."

Baxter *vs.* Ins. Co., 119 N. Y., 450.

"The statute provides that in case such payment is made within the 30 days limited therefor it shall be deemed a full compliance with the requirements of the policy in respect to the payment of premium, and declares that no such policy shall in any case be forfeited until the expiration of 30 days after the mailing of such notice. There is no pretense that this notice was given, but, on the contrary, the

argument of the defendant is to the effect that it did another thing which the statute makes equivalent thereto."

Phelan *vs.* Ins. Co., 113 N. Y., 147.

The court of appeals sitting in New York uses this language:

"We think the statutory provisions had not been fulfilled which were an indispensable preliminary to the right of the defendant to treat the policies as forfeited; and, this being so, the plaintiffs were entitled to enforce the policies, whether there had or had not been a waiver. * * *

"The policies, being New York contracts, were, of course, dominated by the statute respecting forfeitures, as completely as though the statutory conditions had been explicitly incorporated in them. The adjudications of the highest court of the State treat it as one which must be strictly interpreted in favor of the assured, and hold that the defense of a forfeiture through non-payment of premium is not availing to an insurance company, if there has been any departure on its part from the provisions of the statute in regard to notice (Carter *vs.* Insurance Co., 110 N. Y., 15; 17 N. E., 396; Phelan *vs.* Insurance Co., 113 N. Y., 147; 20 N. E., 827; Baxter *vs.* Insurance Co., 119 N. Y., 551; 23 N. E., 1048; McDougall *vs.* Assurance Soc., 135 N. Y., 551; 32 N. E., 251; De Freee *vs.* Insurance Co., 136 N. Y., 144; 32 N. E., 556)."

Hicks *vs.* Insurance Co., 60 Federal (C. C. A.), 692.

"In construing this statute, the courts of New York have held that no forfeiture of a life-insurance policy can occur unless the notice provided for in the statute has been given, and that the burden of showing such notice is on the insurance company, and that the insured is not considered in default of payment until, at least, 30 days after such notice is given; and, although the insured may in fact have failed to make any number of payments, he cannot be regarded in the light of the statute as in default, or as having failed to meet his obligation, until 30 days after such notice is given."

Mullen *vs.* Mutual Life, 34 S. W. (Tex.), 605.

"There are several reasons why the court below was right in refusing to give this instruction. It will be sufficient to state one, and that is that the statute of New York prescribes the condition upon which a policy may be forfeited for the non-payment of a premium. The statute is mandatory and controls the contract. Its provisions are not subject to be set aside or waived either by the company or the assured, or by both together."

Nixon *vs.* Ins. Co., 81 Fed. (C. C. A.), 802.

The above authorities are supported by the following decisions:

Carter *vs.* Ins. Co., 110 N. Y., 15;
De Frace *vs.* Ins. Co., 136 N. Y., 144;
Schad *vs.* Ins. Co., 42 N. Y. S., 314;
Merriam *vs.* Ins. Co., 18 N. Y. S., 305;
Griffith *vs.* Ins. Co., 101 Cal., 621;
Warner *vs.* Ins. Co., 100 Mich., 167;
Osborne *vs.* Ins. Co., 67 Pac. (Cal.), 605;
And numerous other authorities found in this and the original brief.

We maintain that one of the many reasons that prompted the legislature to make the method of forfeiting insurance contracts provided by it the sole and exclusive one, was that policies of insurance only terminate by the death of one party, and it would be unfair and unjust to permit declarations, statements, or oral agreements of the deceased to be substituted for the statutory notice.

The statute which requires the insurance company to serve a specified printed notice instead of oral notice was formulated in part on the true theory that in most cases where controversies would arise over the forfeiture insurance policies under it, the insured would be dead. The notice would speak for itself. It would tell just what oc-

curred. It would not state one thing and mean another. It would convey to the insured the information the legislature thought he ought to have.

But if, on the other hand, it permitted an oral notice to be given or an oral waiver of the notice, or permitted alleged admissions of the insured to take the place of the written notice, it would be giving an unfair and enormous advantage to the insurance company.

The dead could not be called back to life to tell his side of the story. It would leave his representatives wholly at the mercy of the agent of the insurance company. There would be no way to meet such testimony. Every incentive would thus be given to relate only what was beneficial to the one party, and conceal everything to the advantage of the other. To give one side such an advantage would be unfair, unjust. This statute, we maintain, is not susceptible of any such construction. In construing this statute it must be borne in mind all the while that its purpose is protection to the insured.

There is every reason for this rule that there is for that rule established by statute in nearly all States, that no party to an action against the representatives of a deceased party shall be permitted to testify as to what took place between the decedent and such party. All courts have upheld such statutes and enforced them rigorously, as strongly suppressive of fraud. If such a defense as this may be upheld, the statute is of very little consequence, and insurance companies whose agents are of easy conscience can always successfully defend, though they may have violated every essential feature of the statute. Can this court suggest a case where such a defense would not be urged if such a proposition is once established? No court has so far sustained such a defense. On the contrary, they have held the companies to strict compliance.

No premium after the first is due on a contract of insurance under the New York statute until thirty days after service of the statutory notice.

It has been decided over and over again, both by the court of appeals of New York and the lower court, that no premium is due after the payment of the first until 30 days after service of the statutory notice. No policy-holder is in default, he loses no rights under his contract, until he fails for 30 days after the service of the notice to pay the stipulated premium. He has a perfect right to wait until the service of the notice before paying the premium. The company can exact it whenever it chooses to do so on or after the due date in accordance with the contract. It has no legal or moral right to complain about the policy-holder not paying any premium if it fails to serve the notice. The remedy is at all times in its hands. The Stratham case decides nothing more than the insurance company must have the power to cut off unprofitable members. This it has under the New York statute. If it does not do so, it cannot complain about any one but itself. If it does not get the permium or secure the right under the contract to declare forfeited the contract, it simply fails to exercise its power and privilege under the statute. The Baxter case, the Carter case, the Phelan case, decisions of the highest court of New York, had so construed the law before the Phinney contract was made. The Griffith case, in the California supreme court; the Griesemer case, in the supreme court of the State of Washington; the Hicks case, in the circuit court of appeals of the United States sitting in New York, had been decided prior to Mr. Phinney's death.

"The statute prescribes this notice as a necessary condition of forfeiture, and unless it was served the insured was not in default, because payment within thirty days after

notice is to be taken as a full compliance with the conditions as to payment of premium. *In the absence of proof, on the part of the defendant, as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and the statute when read together.* Before the defendant could raise any question in regard to the non-payment of the August premium, it was necessary for it to show that it had complied with the statute by serving the notice, as this step was essential to put the insured in default, or raise any point based on his omission to pay the last quarterly premium."

Baxter *vs.* Ins. Co., 119 N. Y., 450.

"The contract is to be read as if the act of 1876 had been literally incorporated into it. There could be no forfeiture for this cause unless the defendant alleged and proved non-payment after the due service of the notice required by law. * * * As the defendant was never in a position where it could insist upon a forfeiture, it became necessary to consider the question of the sufficiency of the notice served."

De Frace *vs.* Ins. Co., 136 N. Y., 144, on p. 151.

"The statute, however, imposed the duty upon the defendant of sending the notice to the plaintiff in a particular manner, and when it did so it acquired the right to declare a policy forfeited for the non-payment of the stipulated premiums. It was, therefore, incumbent upon the defendant to show that it had complied with the terms of the statute, and it did not do this by showing a delivery of the notice to another person than the plaintiff. Such notice gave it no right to declare the policy forfeited, and in so doing it acted illegally."

Carter *vs.* Ins. Co., 110 N. Y., 15, on p. 23.

"To that extent the express conditions of the policy were altered by the provisions of the statute. This alteration not only worked this change in the absolute right of the parties, but it made a very considerable change as to the proof necessary to be offered by the plaintiff to entitle her to recovery upon the policy. The effect of the statute was that after a policy had once been issued, no act of the insured, by way

of omission to pay the premium, could of itself work a forfeiture of the policy. So far as it was concerned, the contract was a permanent one until some act of the defendant had been done by way of putting an end to it."

Fischer *vs.* Ins. Co., 56 N. Y. S., —.

"In this view of the case it is not necessary to consider the other questions raised. If the proper notice was not given, the assured, at his death, was not in default, and the defendant has no defense to the action."

Shad *vs.* Ins. Co., 42 N. Y. S., 314.

Overruled cases cited by plaintiff in error on question of waiver of the statute of New York.

The case of Insurance Co. *vs.* Curray, relied upon so confidently by plaintiff in error, was distinctly overruled in the case of Ins. Co. *vs.* Rudwig, 80 Ky., 223, on page 235, as follows:

"And when parties have entered into an insurance contract since the adoption of this statute they must be held as contracting with reference to the statutory provision, and, we might add, subject to a like rule, recognized by this court regardless of the statute, and therefore that portion of the opinion in the case of the Farmers' and Drovers' Bank against Curray, expressing a contrary view, is overruled."

The cases of Desmazes *vs.* Ins. Co., 7 Fed., 529, and Caffery *vs.* Ins. Co., 27 Fed., 25, both relating to the law of Massachusetts passed in 1861, and holding to the effect that that statute could be waived, are specifically disapproved of in the case of Holmes *vs.* Ins. Co., 131 Mass., at page 64. They are cited also with disapproval by Judge Dillon in the case of White *vs.* Ins. Co., 4 Dill., p. 177; also in the case of Griffith *vs.* Ins. Co., 101 Cal., p. 627; also, I think, in the case of Ins. Co. *vs.* Rudwig, 80 Ky., 223, on the ground that

they were contrary to the great weight of authority. They are surely contrary in principle to the case of Clement *vs.* Ins. Co., 140 U. S., 226. The other cases cited on this proposition are so clearly not in point that we shall not discuss them.

The statute in question does not cover the statute relative to reserve, but both work in entire harmony.

The company urges with considerable zeal that it was the purpose of the legislature in enacting the law to protect from forfeiture such portion of the policy as the premiums had already purchased. If such was the intention of the legislature, it knew but little about the English language when it enacted the law.

1. If that had been the intention of the legislature, it would have used language appropriate to express such an intent.

2. The language of the act is susceptible of no such construction.

3. No assignment of error was made touching this point, and nothing is in the record upon which such a claim can be based.

4. The legislature did pass a law on the 21st day of May, 1879 (chapter 347, Laws of the State of New York), which explicitly covers and protects the policy-holder as to the reserve on his policy. The two statutes work together in entire harmony, and the one does not cover the evil protected by the other.

The Cohen and Hill cases were decided correctly by the lower court, if this court holds that a contract like Phinney's was a New York contract, and that the printed waiver in the policy is of no avail. This is admitted by plaintiff in error in its brief.

The place of performance of the contract in each of those cases is New York. The stipulation in each contract that the application is made subject to the charter of the company and the laws of New York is identical with this case. The brief of plaintiff in error (p. 143) contains the following:

"This (its defence of waiver, estoppel, etc.) might not apply to cases where one has insured his life for another's benefit, for, as was said in Griffith *vs.* Ins. Co. (101 Cal., at p. 638) 'the doctrine is well settled that when a valid policy is regularly delivered in pursuance of a consummated contract to one who has procured insurance on his own life, payable to another, the insured cannot surrender the policy without the consent of the beneficiary.'"

This language is almost verbatim the language of this court in the case of Washington National Bank *vs.* Hume, 128 U. S., 206, which it cites with approval.

Then if the court holds that under like facts the Phinney contract is a New York contract and the printed waiver is of no force, the application for writs of certiorari should be denied in both the Cohen and Hill cases, now on application before this court for writ of certiorari.

The New York statute of 1897 does not affect the cases of Sears vs. Ins. Co., nor Cohen vs. Ins. Co.

There are many reasons why the statute of 1897 has no effect on the Sears or Cohen cases:

1. That part of the statute of 1897 relied upon (if in a proper case it is susceptible of the construction claimed) is

in effect a statute of limitations. It is a rule of law, without any exceptions, that if a party to an action intends to assert or claim a right under a statute of limitations, he must set it up and claim it by special plea in the trial court. The statute of 1897 was never referred to in the pleadings; it was never claimed in any manner in the trial court.

2. In the original assignment of errors none are based on the statute of 1897. It is a rule of practice as old as this court that it will not review any error not so assigned.

3. Plaintiff in error did not only fail to assign any error predicated on the statute of 1897, but failed to assign any such error in its brief filed in the circuit court of appeals. It made no such claim in the argument before the circuit court of appeals, hence no such proposition was in any manner presented to the circuit court of appeals.

4. The first time and first place in the Cohen and Sears cases that the statute of 1897 was referred to or any claim made under it was in the petition for the writ of certiorari in this court and in its brief in support of the application. So, if those cases were before this court on their merits, either on writ of certiorari or writ of error, this court would not consider, and could not consider, any claim made relative to the law of 1897.

5. The statute of 1897 could not affect the Cohen case under any possible construction that could be placed upon it because Mr. Cohen died in September, 1897; so, no matter what month the law of 1897 went into effect, it was in force less than a year before Mr. Cohen's death, and that event would at once fix and determine the rights of the parties on that contract.

Mr. Sears died in March, 1898, so if the law of 1897 went into effect and force in 1897 in any month subsequent to

March, for like reasons it could not affect Mr. Sears' rights under the contract.

We have not been able to learn the date this act went into effect, but it is not a little remarkable that plaintiff in error did not somewhere in his brief state the date.

6. The contracts in both the Sears and Cohen cases were made subject to the charter of the company and the laws of New York as they then existed. The company would have that stipulation now read that the contract was made subject to the laws of New York as they might be in force at the time any action was begun on the contract, or that the contract was made subject to the laws and any amendments the legislature might thereafter make.

This whole contention of plaintiff in error seems to us absurd. If its contention be true, a contract is to be construed, not by the law covering the contract at the time it is made, but at the time any controversy might arise concerning it. In other words, the rights and obligations of the parties to a contract would change from year to year as the law was amended or changed.

The plaintiff in error practically admits that in cases where the reserve is large the rule it is contending for ought not to prevail.

Plaintiff in error in this brief, on page 102, undertakes to distinguish Carter *vs.* Insurance Co., 110 N. Y., from this case on the ground that in that case there was a tender of the premium by the assured a few days subsequent to the time it became due under the terms of the policy; but, as we have shown, Mr. Phinney tendered the premium in this case within 30 days from the time it was due. The plaintiff in error declined to receive it, on the ground that the policy was forfeited. We can see but very little difference on that point between the Carter case and the present

case. The plaintiff in error, in speaking of Phelan *vs.* Ins. Co., 113 N. Y., says:

"In that case the premium was due on December 30, 1892, and was paid before it was tendered to the company, about two o'clock, on Jan. 15, 1893, just 15 days after it became due. But it was refused. The assured died on the night of that day. It was held that the policy was in force. In the Phelan case a defective notice was served; in the Phinney case no notice was served, yet Mr. Phinney tendered the premium as effectively as did the representatives of Mr. Phelan."

Continuing, the plaintiff in error further says:

"Appplying this familiar principle to the Phelan case, the decision of the court illustrates the true function of the statute. Here was a case where there was large accretion of premium in the hands of the Insurance Co.; here was a default in the payment of the premium, and within a very reasonable time a discovery of the default and an attempt to place the policy-holder right again with the company and a tender of the premium with that end in view."

This language also applies with like force to this case. The attorneys for the plaintiff in error would have the court understand that if there had been a number of premiums paid on the Phinney policy, and consequently a large amount of accretions or reserve accumulated, it would not be here defending in this case.

Not over six weeks ago this same plaintiff in error applied for a writ of certiorari in the case of Cohen. That was a controversy over a semi-endowment insurance policy issued by it and upon which eight years' premiums had been paid, and yet the company likewise defend against the payment of that claim, and in the Cohen case accretions were much larger because it was a semi-endowment contract. We show in that case that these accretions on $3,000 would amount to a sum sufficient to buy a $1,000 policy fully paid, or it would have

purchased extended insurance for the full face of the policy for several years beyond Mr. Cohen's death. At the same time the company applied for writ of certiorari in the case of Sears *vs.* Plaintiff in Error. That was a 10-pay life policy, on which two and one-half years' premiums had been paid. In that case the accretions and accumulations would be very large—in other words, Mr. Sears had paid one-fourth of the amount necessary to purchase a $10,000 life policy.

Yet this company has fought both these cases through the circuit court and circuit court of appeals, and has applied for a writ of certiorari in this court.

Suppose in the Baxter case the company had secured an admission of the insured (contrary to the fact) that the policy had been forfeited, would the insured by that admission have lost all his valuable rights under his contract? Would the insured in that event and by that admission have lost either his right to pay the premiums whenever notice should be served by the company, or would that admission have given the company the right to forfeit that right to pay, as well as the "accretions" which under the New York statute he could use six months after default to purchase extended or paid-up insurance? This, too, contrary to and in the teeth of the statute which provides that such a policy "*shall not be lapsed or forfeited*" or by the company be "*declared lapsed or forfeited*" until thirty days after the service of the statutory notice, and if payment is made in the thirty days limited, it shall be taken in full compliance with the contract as to payment of premiums. Suppose Mr. Phinney had paid 18 out of the necessary 20 premiums to obtain a fully paid-up policy of $100,000, and had permitted the due date of the premiums to go by without payment, and thereafter had admitted that his policy was forfeited, even though the notice was not served, and under the New York statute his policy was fully in force, would he by that wrongful admission lose his right to a

fully paid $90,000 policy? To state the position is to answer it in the negative.

The company could well afford to take the chances it did in this case. In fact, it took no chances. It had made up its mind Mr. Phinney's days were few—that he would live out but a small part of his expectancy. As Mr. Davies said in his oral argument, the company knew Mr. Phinney was going to die soon. It had been notified by two letters that Mr. Phinney had tendered his premium, and it knew that if it served upon him the statutory notice or gave him an opportunity he would pay the premium which would bind it. They claim he admitted the policy was forfeited. If they could keep him or he should remain in that state of ignorance until the statute of limitations run, they would escape liability. On the other hand, if he became aware of his rights, or his representatives should, still the company would lose nothing. Why? Because when its liability would be enforced it could deduct unpaid premiums at six per cent. interest. If Mr. Phinney paid them, the company could only earn about five per cent. (the amount it earns on its investment) on the premiums thus paid. To pursue the course it pursued it had every element of advantage in its favor and none of disadvantage.

It is in just such cases as this where the insurance companies fail to send notices. Would not the insurance company have sent the statutory notice if it had been convinced he could not or would not have paid the premium?—the easiest and simplest way to have terminated the contract in its favor. Certainly it would. But it knew the contrary; it knew Mr. Phinney had made a tender and would pay his premium if given the opportunity. It had telegraphed across the continent to its agent not to accept his premium if tendered.

It was not necessary for the defendant in error to plead or prove the statute of New York, the courts of that State holding, as we have shown, that no premium is due or payable until the service of the notice, and that the burden of proving the mailing of the notice and the non-payment of the premium is upon the insurance company.

We have already shown in both the original brief and in this brief, *infra*, that our pleading is in entire accord with the decisions of New York and Washington—in fact, our pleading is almost identical to that of Baxter *vs.* Ins. Co.—and we ask the court to compare our complaint in this case with the complaint of the Baxter case, which may be found in the appendix.

This form of pleading is sustained by the following authorities:

Baxter *vs.* Ins. Co., 119 N. Y., 450.
De Frace *vs.* Ins. Co., 136 N. Y., 144.
Fuscher *vs.* Ins. Co., 56 N. Y. S., 262.
Griffith *vs.* Insurance Co., 101 Cal., 621.
Nixon *vs.* Insurance Co. (C. C. A.), 81 Fed., 796, 802.
Griesmer *vs.* Insurance Co., 10 Wash., 202.
Warner *vs.* Insurance Co., 100 Mich., 167, 159, 160.
Osborne *vs.* Ins. Co., 67 Pac. (Cal.), 616.
Ins. Co. *vs.* Mullen, 34 S. W., 605.

It is a rule of law as old as the courts of the United States that it is unnecessary to aver or prove the laws of any State of the Union. It is only necessary to show that a contract is governed by the laws of a particular State, and then plead the facts that would entitle the pleader to recover if the action was brought in the courts of such State.

In this case defendant in error averred that the plaintiff in error was incorporated under the laws of New York. She further alleged in paragraph II that the defendant made, executed, and delivered in the city of New York and State

of New York a certain contract or policy of insurance. It then sets forth the policy *hac verba*, which provides the company shall pay its contract of $100,000 in the city of New York. The insured is to pay all the future premiums in the city of New York. The policy recites that it is executed in New York; that proofs of death are to be submitted to it at its home office in New York.

In paragraph III she further alleges "that the application contained the agreement that it *was made subject to the charter of the company and the laws of the State of New York.*" It shows the plaintiff was relying on the contract and all the laws of New York that were operative on a contract of such nature. We have shown that we followed, in pleading our case under this law, the rule as settled by the highest courts of the State of New York on similar contracts. It is very evident that plaintiff in error so understood the pleading in page 3 of its complaint (Record, p. 36). It alleges: "that defendant is informed and believes that plaintiff relies upon an alleged non-compliance by defendant with the laws of the State of New York for the year 1876; chapter 341, as amended by the laws of the State of New York for the year 1877, chapter 321, and upon the construction of the said law as claimed by the plaintiff," etc. (p. 36, paragraph 3).

It is very evident that plaintiff in error was not misled as to our "alleged" cause of action. It understood perfectly that we were relying upon this statute of New York as it had been construed, and that our pleadings were based upon that theory. Its answer was drawn upon that theory, and upon none other.

It would be hard to conceive of a pleading in which more facts are stated showing that a certain contract was wholly governed by the laws of a particular State. We have shown heretofore that these facts being admitted, this court is bound as a matter of law to pronounce it a New York contract. Having plead the facts showing it to be a New York con-

tract, we can claim the benefit of any New York law which is to our advantage.

This court recognizes this long-standing rule. Having averred facts in our complaint showing that our contract was governed by the laws, and having stated all the facts that would have been necessary if we were suing on the contract in the New York courts, it was not necessary to plead or prove the statute. The following authorities clearly support this:

"There was no error in not allowing the statutes of limitation of New York and Illinois to be offered in evidence, after the court had overruled the motion of the defendant to be allowed to plead them as a defense. The only way in which such statutes are available as a defense is when they are at the proper time specially pleaded (1 Chitty on Pl., 514, 515; Stephen on Pl., 76, note; Wilson *vs.* King, 83 Ill., 232).

"With respect to the refusal of the court to allow certain other public statutes to be introduced in evidence, it need only to be said that the courts of the United States take judicial notice of all the public statutes of the several States."

Gormully *vs.* Bunyan, 138 U. S., 623.

"In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every State of the Union, *because those laws are known to the court below as laws alone, needing no averment or proof.* Course *vs.* Stead, 4 Dall., 22, 27 (4 U. S., bk. 1, L. ed., 724, 726)."

Hanley *vs.* Donohue, 116 U. S., 1–6.

In the still earlier case of Lamar *vs.* Micou, 114 U. S., 218, the same court announces the same rule as follows:

"*The law of any State of the Union, whether depending upon statutes or upon judicial opinion, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof* (Owings *vs.* Hull, 9 Pet., 607; Bennington *vs.* Gibson, 16 How., 65; Draw Bride Co. *vs.* Sheperd, 20 How.,

227; 61 U. S., bk. 15, L. ed., 396). And nothing has now been adduced tending to show that as applied to the facts admitted by the parties, either the law of Georgia or the law of New York was other than we have held it to be.

"The Federal courts take judicial notice of the laws of all States, and it is only necessary that the pleadings show a state of facts to which any statute will apply, and the statute will be taken into consideration without averment or proof."

L'Engle *vs.* Gates, 74 Fed., 513.

Mr. Justice Story, speaking for the same court, in Owings *vs.* Hull, says:

"We are of the opinion that the circuit court was bound to take judicial notice of the laws of Louisiana. The circuit courts of the United States are created by Congress, not for the purpose of administering the local law of a single State alone, but to administer the laws of all the States in the Union, in cases to which they respectively apply. The judicial power conferred on the General Government by the Constitution, extends to many cases arising under the laws of the different States. And this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of and administer the jurisprudence of all the States. This jurisprudence is, then, in no just sense, a foreign jurisprudence to be proved in the courts of the United States, by the ordinary modes of proof by which the laws of a foreign country are to be established; *but it is judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts.*

Owings *vs.* Hull, 9 Pet., 607, on p. 625.

"And in further affirmation of the doctrine here laid down we hold that the courts of the United States can and should take notice of the laws and judicial decisions of the several States of this Union, and that with respect to these *nothing is required to be specially averred in pleading which would not be so required by the tribunals of those States respectively.*"

Pennington *vs.* Gibson, 16 Howard, 65.

What facts did we not aver that it would have been necessary to aver if we had begun this action in the courts of New York? (See Baxter case, De Trace case, *et al.*) None can be shown. The ninth circuit court of appeals in a case identical with this, so far as the pleadings were concerned, the same contention being made as here, disposes of it in these words:

"In the first place, the cases cited and relied upon by the plaintiff in error are clearly distinguishable in their facts from the case at bar, in this: that the plaintiff's right of recovery therein rested solely upon another separate and distinct cause of action from the one stated in their complaint. In the present case the right of the defendants in error to recover is based exclusively upon the contract set out in their complaint, to wit, the policy of insurance. The cause of action set out in the complaint was based upon the identical facts upon which the court gave judgment. There was therefore no departure in this case either from fact to fact, or from law to law, and hence the principle contended for has no application to this case. There was no necessity for the defendants in error to plead the statute of New York. The United States courts take judicial notice of all the public statutes of the several States. Moreover, the question of forfeiture was solely a matter of defense. It is not considered good pleading to anticipate matters of defense."

Ins. Co. *vs.* Hill, 97 Fed., 263, on p. 269.

To the same effect are the following:

Gordon *vs.* Hobart, 2 Sumn., 401.
Woodworth *vs.* Spaffords, 2 McLean, 168.
Jasper *vs.* Porter, 2 McLean, 579.
Jones *vs.* Hays, 4 McLean, 521.
Mewster *vs.* Spalding, 6 McLean, 24.
Merrill *vs.* Dawson, Hempst., 563.
Harpending *vs.* Reformed Dutch Church, 16 Pet., 455.
Covington Draw Bridge Co. *vs.* Shepard, 20 How., 227.
Beatty *vs.* Knowler, 4 Pet., 152.

United States *vs.* Perot, 8 Otto, 428.
U. S. *vs.* Turner, 11 How., 663–668; 13, 856–'9.
Chever *vs.* Wilson, 9 Wall., 108–'19, 604.
McNeil *vs.* Holbrook, 12 Pet., 84.
Christmas *vs.* Russel, 5 Wall., 302.
Ellwood *vs.* Flanigan, 104 U. S., 562.

The entire argument of plaintiff in error upon this point is based upon the decision of the Supreme Court of the United States in the case of *Union Pacific Railway Co. vs. Wyler*, 158 *U. S.*, 285, in which Wyler commenced an action in the *State court* of Missouri, alleging that while at work for the railway company in Kansas he had suffered a personal injury through the negligence of the company in employing an incompetent fellow-servant with previous knowledge of his incompetency. The complaint contained no allegation of negligence on the part of the fellow-servant, but was confined, as above stated, to an allegation that the negligence was that of the company in employing an incompetent fellow-servant. There was in force at the time a Kansas statute making every railroad company liable for damages done an employé in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés. The case was removed to the circuit court of the United States for the western district of Missouri, where an amended complaint was filed, which eliminated the charge of incompetency on the part of the fellow-servant and the averment of knowledge of such incompetency on the part of the railway company, and in which the plaintiff rested the cause of action exclusively upon the negligence of the fellow-servant, averring that the company was liable therefor by virtue of the provisions of the Kansas statute. The amended complaint was filed more than five years after the happening of

the accident. To the amended petition the company pleaded the statute of limitations of Missouri, which bars actions for personal injuries after five years. The question before the court was whether the amended petition set up a different cause of action than that alleged in the original petition, for if it did the commencement of the new action was to be regarded as dating from the filing of the amended petition, and therefore the bar of the statute would apply.

The inapplicability of the principles announced by the Supreme Court of the United States in this case can be best pointed out if we test the Missouri case by the case at bar.

If the Missouri case had been brought originally in the Federal court, as was this case, and the original complaint had alleged that the injury was caused the plaintiff while working for the railway company in Kansas by the negligence of the fellow-servant, it is entirely clear not only that the case would have been decided otherwise if the question was raised, but also that such a question would never have been raised in the case. In the case at bar the plaintiff states the making of the contract of insurance, the payment of the first premium, and the terms of the application upon which it is based, to wit, that the application is made under the charter of the company and the laws of the State of New York, and the further fact that the policy expressly provided that the application should be deemed a part thereof and of the contract of insurance. The allegation of these facts brought into the case the statute of New York. The statute was a public statute of said State, and there is at this day no question but that the Federal court sitting in Washington takes judicial notice of the public laws of New York without averment or proof thereof, and that it is not only unnecessary but poor practice to set out any such public statute in a pleading. Having pleaded a contract of which the general laws of the State of New York were made

a part by the terms of the contract, either party to the action was at liberty to claim upon demurrer, or at any other stage in the case, or by any other method, the benefit of any New York statute which was to his advantage.

We respectfully submit that the circuit court of appeals should be affirmed in its judgment dismissing the writ. If this court holds against us on that contention, we maintain that the judgment of the circuit court in all things should be affirmed.

Respectfully submitted.

S. WARBURTON,
Attorney for Defendant in Error.

APPENDIX.

STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, William H. Shankland, clerk of the court of appeals of the State of New York, do hereby certify that I have compared the annexed copies of the complaint, case, and exceptions, and Exhibit A in the case of John T. Baxter, respondent, against The Brooklyn Life Insurance Company, appellant, with printed copies thereof taken from the case and exceptions submitted on the argument of said case in the court of appeals on the 29th day of January, 1890, and now bound up and contained in volume No. 8 of cases and points for the year 1890, and that the same are true copies of the printed copies of said complaint, case, and exceptions and exhibit contained in the volume aforesaid now remaining on file in this office.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this eighth day of November, A. D. 1899.

[Seal State of New York Court of Appeals.]

W. H. SHANKLAND, *Clerk.*

Supreme Court, Cattaraugus County.

JOHN T. BAXTER
against
BROOKLYN LIFE INSURANCE COMPANY.

The plaintiff herein, by Cary & Rumsey, his attorneys, for a complaint and cause of action against the defendant

alleges upon information and belief that at all the times herein mentioned the defendant was and still is an insurance corporation, organized and constituted and doing business under and by virtue of the laws of the State of New York, and engaged in the insurance of the lives of persons.

That on or about the 24th day of May, 1884, the said defendant, for value received, made an agreement in writing with and issued its written policy to and on the life of Joel J. Matteson, whereby and in and by the terms of which the defendant, in consideration of the payments hereinafter named, agreed and undertook that within sixty days after the receipt by it of satisfactory proofs of the death of the said Joel J. Matteson it would pay to Maria Matteson, wife of the person hereby insured, for her sole use, the sum of three thousand dollars.

That it was agreed on the part of said Joel J. Matteson that in consideration of the issuance of said policy and the making of said agreement on the part of the defendant he would pay to it during his lifetime the sum of twenty dollars and ninety-seven cents each quarterly year, and that up to the time of the death of said Joel J. Matteson the said insured had made the payments upon said policy as agreed with said defendant.

Plaintiff further alleges upon information and belief that the said Joel J. Matteson died at the city of Bradford on the 7th day of September, 1884, and left him surviving his wife, Maria Matteson, for whose benefit said policy was issued and to whom the loss on the same was made payable.

Plaintiff further alleges upon information and belief that after the death of said Joel J. Matteson and on or about the 10th day of March, 1885, the said Maria Matteson caused to be delivered to the defendant proofs of the death of said Joel J. Matteson; that said proofs were delivered to one Jenkins, who was at said time in the employ of said defendant and who was duly authorized by it to receive the

same; that the proofs of death so delivered to and furnished the defendant were satisfactory proofs of the death of said Joel J. Matteson and were made in accordance with the directions of said defendant.

Plaintiff further alleges upon information and belief that on or about the 10th day of March, 1885, proofs of the death of the said Joel J. Matteson were delivered to the defendant.

Plaintiff further alleges upon information and belief that more than sixty days had elapsed from the time of the delivery of the proofs of loss as aforesaid up to the time of the commencement of this action, and that the said sum of three thousand dollars came due and payable before the commencement of this action and remains wholly unpaid.

The plaintiff further alleges that before the commencement of this action and prior to the issuance and service of the summons herein the said Maria Matteson, by an instrument in writing, duly sold, assigned, and transferred to this plaintiff the said sum of three thousand dollars and interest, due and owing to her by the defendant, and the claim and demand against the defendant for the same, and the right to sue for and collect the same from the defendant, and that the plaintiff is now the owner and holder of said demand and claim.

Wherefore the plaintiff demands judgment against the defendant for the sum of three thousand dollars, with interest thereon from the 10th day of May, 1885, besides the costs of this action.

CARY & RUMSEY,
Plaintiff's Attorneys, Olean, N. Y.

STATE OF NEW YORK, } ss:
Cattaraugus County, }

John T. Baxter, being duly sworn, deposes and says he is the plaintiff in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to

the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JOHN T. BAXTER.

Sworn to before me this 29th day of September, 1885.

E. F. KRUSE,
Notary Public.

Supreme Court, Cattaraugus County.

JOHN T. BAXTER
ag'st
THE BROOKLYN LIFE INSURANCE COMPANY.

Case and Exceptions.

This action was commenced on the 8th day of September, 1885, by the service of a summons.

The complaint was served on the 4th day of October and the answer on the 5th day of November, 1885. Copies of the summons, complaint, and answer are contained in the judgment-roll.

The issues joined in this action came on to be tried before the Honorable Albert Haight, one of the justices of this court, at a circuit court held in and for the county of Cattaraugus, on the 12th day of September, 1886.

A jury was called and sworn, and the plaintiff, by his counsel, opened the case.

The plaintiff, to maintain the issue on his part, offered in evidence a policy of insurance, dated the 24th day of May, 1884, issued by the defendant on the life of Joel J. Matteson, payable to Maria Matteson, and the same was received in evidence. A copy of said policy is hereto annexed and marked Exhibit "A."

The plaintiff then called as a witness MARIA MATTESON, who, being duly sworn, testified as follows:

I reside in McKean county, Pennsylvania. Joel J. Matteson was my husband. He lived at Dayton, in Cattaraugus county, 1884. There was a time in 1884 when he went to Pennsylvania. I really do not remember what time it was. He went there before I was acquainted with him. I was married to him ten years ago, the twenty-seventh of May. In 1884 he lived in Emporium, McKean county. He died on the 6th day of September, 1884, at the town of Bradford. He was complaining all through the month of August. He went down to the mill and hurt himself. From the middle of August up to the time of his death he was confined to his bed, and during such time he was unable to transact any business; did no business during that time. He was buried in Smithport. I was present at the time of his death and burial. He lived about ten miles from the city of Bradford, but in the township of Bradford, in Pennsylvania.

Counsel shows paper to witness.

Question. Is that your signature?
Answer. Yes, sir.

Counsel for the plaintiff offered in evidence the paper referred to, the same being an assignment and transfer by the witness to the plaintiff of the cause of action mentioned in the complaint; which assignment bore date prior to the commencement of this action, and the same was received in evidence.

The counsel for the plaintiff here rested.

The counsel of the defendant then moved for a nonsuit on the ground that the insured had failed to comply with the terms and conditions of the policy by neglecting to pay the quarterly premium stipulated to be paid by the terms of the policy on the 24th day of August prior to the death of the insured.

The motion was denied; to which decision the counsel of the defendant then and there duly excepted.

It was stipulated in open court by both parties to the action that there is due on the policy $3,177.09, for which sum the plaintiff is entitled to a verdict if a recovery can be had in his favor.

The court then directed the jury to find a verdict in favor of the plaintiff for the sum of three thousand one hundred and seventy-seven dollars and nine cents.

To which direction the defendant's counsel then and there duly excepted.

The jury, as directed, found a verdict in favor of the plaintiff for $3,177.09.

The court then ordered that the exceptions so taken be heard in the first instance at the general term, and that judgment be suspended in the meantime; that the defendant have sixty days to prepare and serve case, and that if made and served that the stay continue until the hearing and decision of the motion at general term.

All the evidence and proceedings had upon the trial are above stated.

WILLIAM H. FORD,
Defendant's Attorney,
No. 51 Liberty Street, New York.

EXHIBIT A.

The Brooklyn Life Insurance Company of New York.

(Vignette.)

Amount, $3,000.	Quar. prem., $20.97.
No. 21839.	Age, 35 years.

By this policy of assurance, in consideration of the application for this policy, and of each of the statements and agreements made therein, and under the conditions and

limitations hereinafter specified, promise to pay to Maria Matteson, wife of the person hereby insured, for her sole use, if living, and if not living, to the children of said person, or their guardian for their use, or if there be no such children surviving, then to the executors, administrators or assigns of the person hereby insured, the sum of three thousand dollars, at the office of said company, in the city of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of this policy of Joel J. Matteson of Bradford, in the county of McKean, State of Pennsylvania.

Subject to the following conditions and limitations:

1st. The quarter-annual premium of twenty dollars and ninety-seven cents shall be paid in advance on the delivery of this policy and thereafter on the twenty-fourth day of August, November, February and May, in every year, during the continuance of this contract.

2nd. If any statement in the application be untrue, or if the insured shall engage in any unlawful occupation, or (unless by written permission of the company) in any occupation forbidden on the back of this policy, or if he shall be convicted of felony, or in case he shall die in consequence of violating law, or by his own act, whether sane or insane, or from the effects of the intemperate use of stimulants or narcotics, this company shall not be liable for more than the next reserve for this policy at the time of death, computed according to the American experience table of mortality, with four and one-half per cent. compound interest.

3rd. This policy shall be void if any premium or part of a premium be not paid when due; but if such forfeiture shall occur after three full years' premiums have been paid, the company will issue a paid-up whole life policy, in accordance with the provisions of chap. 347, of the Laws of 1879, of the State of New York, provided this policy shall be surrendered, duly receipted, within six months of the date of default in payment of premium, as mentioned above.

4th. The provisions and requirements printed by the company upon the back of this policy, are hereby referred to and accepted as part of this contract, as fully as if they were recited at length over the signatures hereto affixed.

But it is specially agreed that if the death of the insured shall take place after three years while this policy is in force, and not in consequence of any unlawful act or forbidden occupation then in no such case shall the full liability of the company under this policy be disputed.

In witness whereof, the Brooklyn Life Insurance Company have by their president and secretary signed and delivered this contract at the city of New York, in the State of New York, this twenty-fourth day of May, one thousand eight hundred and eighty-four (1884).

W. M. COLE, *President.*

WM. DUTCHER, *Secretary.*

Printed on the back of said policy and referred to therein is the following provision:

6th. This policy is a contract made and to be executed in the State of New York, and shall be construed only according to the laws of that State, and no suit shall be brought against the company upon this policy, except in the courts of that State, or in the circuit or district courts of the United States, nor shall any such suit be brought after the lapse of one year from the time when the cause of action accrues.

STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, clerk of the court of appeals of the said State of New York, do hereby certify that I have compared the annexed copy of answer made from a printed

copy thereof submitted and filed on the argument of the case of John T. Baxter ag'st The Brooklyn Life Insurance Company, in the court of appeals, on the 29th day of January, 1890, now bound up and contained in volume No. 8 of cases and points for the year 1890, and on file in this office, and that the same is a correct transcript therefrom.

In witness whereof I have hereunto set my hand and affixed my official seal, at the city of Albany, this tenth day of November, A. D. 1899.

[Seal State of New York Court of Appeals.]

W. H. Shankland, *Clerk.*

Supreme Court, Cattaraugus County.

John T. Baxter
ag'st
The Brooklyn Life Insurance Company.

The defendant answers the complaint of the plaintiff:

I. The defendant denies the following allegations of the complaint: That it was agreed on the part of the said Joel J. Matteson that in consideration of the issuance of said policy and the making of said agreement on the part of the defendant he would pay to it during his lifetime the sum of twenty dollars and ninety-seven cents each quarterly year, and that up to the time of the death of said Joel J. Matteson the said insured had made the payments upon said policy as agreed with the defendant, and that the sum of three thousand dollars came due and payable before the commencement of this action. The defendant has no knowledge or information sufficient to form a belief whether the said Maria Matteson made the assignment to the plaintiff alleged in the complaint.

II. The defendant, for a separate defense to this action, alleges that on the 24th day of May, 1884, the defendant, on

the application of said Joel J. Matteson and Maria Matteson, by its certain policy of insurance, in consideration of the application for said policy and of each of the statements and agreements therein contained and under the conditions and stipulations thereinafter in said policy specified, did promise to pay to Maria Matteson for her sole use, if living, the sum of three thousand dollars, at the office of the company in the city of New York, within sixty days after receipt of satisfactory proofs of the death during the continuance of said policy of said Joel J. Matteson, subject, however, to the following conditions and limitations, among others, to wit, that the quarter-annual premium of twenty dollars and ninety-seven cents should be paid in advance on the delivery of said policy, and thereafter on the twenty-fourth day of August, November, February, and May in every year during the continuance of said contract of insurance, and that said policy should be void if any premium or part of a premium should not be paid when due.

That the aforesaid policy and contract insuring the life of Joel J. Matteson are the same policy and contract of insurance alleged in the plaintiff's complaint in this action.

The defendant alleges that on the twenty-fourth day of August, 1884, a premium of twenty-four dollars and ninety-seven cents became due on said policy, and that the sum so due and no part thereof has been paid.

Wherefore the defendant demands judgment that the complaint in this action be dismissed with costs.

WILLIAM H. FORD,
Defendant's Attorney.

CITY AND COUNTY OF NEW YORK, *ss.:*

William Dutcher, being duly sworn, says he is the secretary of The Brooklyn Life Insurance Company, the defendant in this action, and that the foregoing answer is true to

the knowledge of this deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

WM. DUTCHER.

Subscribed and sworn before me this 5th day of November, 1885.

JOHN W. JENKINS,
Notary Public, N. Y. County.

No. 12.

Addition to Record.

IN THE

Supreme Court of the United States.

No. 12.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PLAINTIFF IN ERROR AND PETITIONER,

vs.

NELLIE PHINNEY, AS EXECUTRIX, &c.

Opinion of United States Circuit Court for the District of Washington.

DELIVERED MARCH 26, 1895.

HANFORD, *District Judge:*

This case was argued upon demurrer to the affirmative defenses in the answer.

The second affirmative defense pleads no facts. A mere naked conclusion that the contract of insurance was waived, abandoned, and rescinded is alleged. That is not a good pleading, and for that reason the demurrer to that defense is sustained.

The third affirmative defense pleads a breach of warranty as a defense, and, in accordance with the opinion which I have filed in the case of Christine Selby against this same

defendant (67 Fed., 490), that defense is insufficient. The case is exactly like the Selby case, and comes within the rule that I have given in the opinion in that case. On that ground the demurrer to the third affirmative defense is sustained.

The fourth affirmative defense is entirely made up of conclusions of law. This defense anticipates the claim and contention of the plaintiff (which is not set out in any other part of the pleadings) in regard to the effect of the New York statute upon life insurance policies issued by companies doing business in that State, and attacks the statute for being repugnant to the Constitution of the United States, and void. This is entirely a matter of law, and contains no facts constituting a defense. The demurrer to that defense is sustained on that ground.

Now I go back to the first affirmative defense. This sets forth the place and the manner of the making of the contract, and the terms of the contract. It shows that the application for insurance was written and signed by Mr. Phinney in the State of Washington, and transmitted through a local agency of the insurance company in this State to the general Pacific Coast agency in San Francisco, and thence to the home office in New York. The policy was written in New York, and transmitted through the general Pacific Coast agency in San Francisco to the local agency in this State, and delivered to Mr. Phinney, and the first premium upon the policy was collected in this State. By the terms of the policy the premiums are payable annually, on a specified day, and the policy is to be void if the premiums are not paid. It shows that two annual premiums, after the first one, accrued before Mr. Phinney's death, and were not paid. It shows also that the policy c[illegible]ains a provision that notice that the premiums are due [illegible] payable on the dates mentioned in the policy is give[illegible] and accepted by delivery of the policy, and any other notice or obligation to give notice is waived. Now, that is a complete defense under the general

law governing the making of contracts. An agreement to insure, upon condition that the insured shall make periodic payments of premiums, binds the insurer only if the premiums are paid, and failure to pay the premiums avoids all liability, and relieves the insurer of all liability to pay. But the State of New York has made a statute of a radical nature, intended to check somewhat the large accumulation of money in the hands of life insurance companies through forfeitures of premiums, by giving the people dealing with these companies some percentage of advantage, making it a condition of the right of an insurance company to avoid the policy and forfeit the premiums that have been paid that the company shall issue a certain prescribed kind of notice; and the decisions of all the courts of this country, in New York and other States and the Federal courts, tend to sustain this law, and to hold the insurance companies to a strict compliance with the statute, as a prerequisite condition to the avoidance of a policy for non-payment of premiums. In numerous cases it has been adjudged that the insurance company is liable notwithstanding the failure to pay premiums when due, by reason of their failure to prove that the notice was sent as required by the statute. So that, under the law of New York, this defense is insufficient, because it does not allege that the insurance company sent the notices prescribed by the statute of New York. There being this difference between the general law of contracts and the law of New York, the question is squarely raised whether this contract and the rights of the parties are to be in accordance with the statute of New York or with the general law of contracts, which is the law of the State of Washington. The defendant contends that this is a Washington contract, because the contract was made here. It was made here because the last act necessary to complete the making of the contract was in this State, and according to all the rules and authorities it is the law of the place of the contract, in the sense that this is

the place where the contract was made; and it is a general rule of law that contracts are subject to the laws of the place where made, as regards the formalities necessary, in entering into a contract, to bind the parties, and as to the validity of the contract itself. The law of the place where the contract is made is also the law by which the contract must be construed, and by which the obligations of the parties are to be determined, unless it appears that they have contemplated, at the time of making the contract, a different law; and usually it is understood that they do contemplate a different law to govern the liability of the parties where they expressly contract that the performance is to be at a place where there is a different law. I must decide this case according to what appears from the pleadings to have been the intent of the parties as to what law should govern its construction, and determine the obligation of the parties as to performance. In the first place, it is expressly provided that the premiums to be paid are payable at the home office of the company in New York; that the amount of money which the insurance company agreed to pay as insurance shall be payable at the company's office in New York, and proof of the death is to be made there; so that in all particulars this contract is to be performed in New York. New York, therefore, is the place of the contract in the sense that it is the place at which the parties agreed to perform their contract on both sides—pay the money for the premiums there, and pay the insurance, if any accrues, there. In addition to that, the application for the insurance, signed by Mr. Phinney, contains the declaration that the application is made to the Mutual Life Insurance Company of New York, subject to its charter and the laws of New York. This application, by its own terms, and by the express provisions of the policy issued upon it, is a part of the contract.

It is contended that the parties have not adopted the law of New York as to the policy, but only as to the applica-

tion. I can hardly understand why parties would intentionally complicate a contract by making the law of New York applicable to one part of it, and yet have it in other respects governed by the laws of the State of Washington. It is not made to appear to me in any way what particular law of New York they wanted to avoid by having the contract executed here, or what particular law of the State of Washington they wanted to avoid by having the application made subject to the laws of New York. If there was any such intention, it would look as if this provision made by the company in the printed blank which they used for making the application was an intentional trick to operate against the insured in any way in which the laws of New York would be prejudicial to him without binding the company to the strictness prescribed by the laws of New York, so far as they operate in favor of the insured. If I should give the contract such a construction, I do not think that it would be fair. There is, at least in the contract itself, evidence that the parties had in contemplation the law of New York as an element of the contract, and by having expressly provided that the contract is to be performed in New York they have made the laws of New York the law of the place of the contract, so far as it affects the obligation of the parties in respect to performance. The law of New York, by its terms, applies to all life insurance companies transacting business in that State. It is contended that this statute, if it is made to apply to contracts of life insurance entered into outside of the State, is unconstitutional, because it will not operate equally upon all life insurance companies doing business in New York; that the legislature has not the power to prescribe an obligation of this kind to affect a Connecticut life insurance company doing business in New York and also doing business in the State of Washington, as regards the contracts of the Connecticut company made in Washington, and that, therefore, a home

company would be placed at a disadvantage, as compared with a company of a diffrent State transacting business in New York. I think that argument is based upon false premises. I think that the binding force of the statute applies to all companies equally. It applies to all New York companies as to all business which they do in that State, and it applies to Connecticut companies as to all business that they do in New York. I think that if a Connecticut company, having an office in New York, writing and issuing policies there, collecting premiums there, and doing all the business of life insurance companies in the State of New York, should receive an application at its office in New York, from Washington, act upon it there, issue a policy there, which by its terms would be performed in the State of New York, the contract would be governed by the law of New York, just the same as though its incorporation was under the law of New York instead of being under the law of Connecticut. This statute has been upheld by so many decisions that it is beyond question a valid statute with respect to all business transacted within New York. Now, this transaction, although the contract was made in the State of Washington, is business done in New York. The policy was written there; the default of the insured, and right of forfeiture, could only occur in New York, because there could be no default in payment until, on the date when the premiums were due, the insured failed to pay the premium in New York. There is where the default occurred upon which alone this company can claim to be released from its liability under the policy. This subject of the law of the place of contracts has received attention from the Supreme Court of the United States in a number of cases, and the difference between cases where the law of the contract is the law of the place where the contract is entered into and those in which the contract is governed by the law of the place of performance

is illustrated in a number of decisions,—in some of the older decisions as well as the late ones. One of the clearest expositions of the law is to be found in the opinion of Mr. Justice Hunt in the case of Scudder *vs.* Bank, 91 U. S., 406. In the course of the opinion, Justice Hunt makes this statement:

"The rule is often laid down that the law of the place of performance governs the contract. Mr. Parsons, in his treatise on Notes & Bills, uses this language: 'If a note or bill be made payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written or signed or dated' (page 324). For the purpose of payment and the incidents of payment, this is a sound proposition. Thus the bill in question is directed to parties residing in St. Louis, Mo., and contains no statement whether it is payable on time or at sight. It is, in law, a sight draft. Whether a sight draft is payable immediately upon presentation, or whether days of grace are allowed, and to what extent, is differently held in different States. The law of Missouri, where this draft is payable, determines that question in the present instance. The time, manner, and circumstances of presentation for acceptance or protest, the rate of interest when this is not specified in the bill, are points connected with the payment of the bill; and are also instances to illustrate the meaning of the rule that the place of performance governs the bill. The same author, however, lays down the rule that the place of making the contract governs as to the formalities necessary to the validity of the contract. Thus, whether a contract shall be in writing, or may be made by parol, is a formality to be determined by the law of the place where it is made. If valid there, the contract is binding, although the law of the place of performance may require the contract to be in writing (Dacosta *vs.* Davis, 24 N. J. Law, 319). So when a note was indorsed in New York, although drawn and made payable in France, the indorsee may recover against the payee and indorser upon a failure to accept, although by the laws of France such suit cannot be maintained until after default in payment (Aymar *vs.* Sheldon, 12 Wend., 439). So if a note, payable in New York, be given in the State of Illinois, for money there lent, reserving ten

per cent. interest, which is legal in that State, the note is valid, although but seven per cent. interest is allowed by the law of the former State (Miller *vs.* Tiffany, 1 Wall., 310; Depau *vs.* Humphreys, 8 Mart. (N. S.), 1; Chapman *vs.* Robertson, 6 Paige, 634; Andrews *vs.* Pond, 13 Pet., 65). Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. A careful examination of the well-considered decisions of this country and of England will sustain these positions."

That case has been referred to, and the distinction is further brought out in a later decision of the Supreme Court in Pritchard *vs.* Norton, 106 U. S., 124, 1 Sup. Ct., 102. It is also referred to, and its doctrine is recognized as sound, in the case of Liverpool & G. W. Steam Co. *vs.* Phenix Ins. Co., 129 U. S., 397, 9 Sup. Ct, 469, where Mr. Justice Gray reviews the American and English decisions. His application of the rule may seem to be inconsistent with my conclusion in this case. The Supreme Court certainly held in that case that the law of the place of making the contract governed as to the validity of a stipulation by which one party agreed in advance to waive all claim for damages by reason of a breach of the contract by the other party. The principle of that case would be applicable to the case we have in hand if the conditions were exactly the same; but they are not. That was a contract of a carrier for transportation of merchandise from New York to England. The performance began in New York, and was to have been finally completed in England. There is a difference between the law of this country and the law of England as to the right of a carrier to exempt itself entirely from liability for damage caused by neg-

ligence of its servants. The Supreme Court applied the laws of this country, and nullified a provision in the bills of lading by which the carrier sought to be thus exempted. I do not think, under the principles recognized by the Supreme Court, the case would have been so decided if it had been a contract which was to have been entirely performed in England. The opinion makes it very plain that the court intended to rest its decision upon the facts that the contract was made in New York, the ship-owner having a place of business there, and the shipper being an American. The contract was single; its principal object, the transportation of goods, being one continuous act, to begin in New York, to be chiefly performed on the high seas, and to end at Liverpool; and there was nothing in the contract or surrounding circumstances tending to show that the parties looked to the law of England, or to any other law than that of the place where the contract was made.

The case of Scudder *vs.* Bank is cited with approval by the Supreme Court in the opinion of the Supreme Court in Coghlan *vs.* Railroad Co., 142 U. S., 101, 12 Sup. Ct., 150. The syllabus reads:

"When a contract for the payment of money at a future day, with interest meanwhile payable semi-annually, is made in one place, and is to be performed in another, both as to interest and principal, and the interest before maturity is payable according to the legal rate in the place of performance, the presumption is, in the absence of attendant circumstances to show to the contrary, that the principal bears interest after maturity at the same rate."

And that is shown to be so, because the law of the place of performance governs the contract as to the manner of performance. The opinion is by Mr. Justice Harlan, and he reviews a great many decisions, and squarely recognizes the doctrine laid down by Judge Hunt and by Judge Matthews in the cases above referred to, and shows that it is in harmony with the decision of the Supreme Court by

Judge Gray in the case of Liverpool & G. W. Steam Co. *vs.* Phenix Ins. Co.

The waiver of notice is in the policy itself, and the provisions of the statute must prevail, notwithstanding a waiver of notice in the contract; and that is upon a principle, recognized in a number of decisions of the Supreme Court of the United States, that parties cannot make a contract whereby the requirements of a statute which is made in pursuance of a general policy can be evaded. This waiver of notice is contrary to the policy of the law of New York, and, although it is a provision made for the benefit of individuals, the individuals cannot, by their contracts, abrogate the positive provisions of a statute. The reasons for this rule are well stated by Mr. Justice Gray in the opinion of the Supreme Court in the case of Liverpool & G. W. Steam Co. *vs.* Phenix Ins. Co., *supra*, in which it was held that the policy of the laws of this country is against carriers making contracts in advance, securing exemption from liability for their own negligence. That was a case where the shipper expressly contracted to relieve the carrier from all risk and all liability resulting from the negligence of officers or crew of the ship or agents of the company handling the merchandise. Notwithstanding that contract, the Supreme Court held that the laws of the country in which the contract was made forbid such contracts. It is certainly the policy of the New York law to prohibit insurance companies from avoiding their policies for non-payment of premiums where they fail to give the notice prescribed. I hold that the law of New York is applicable to this contract, and the defense is not sufficient, because it would not be a good defense in New York. The demurrer is sustained.

Mr. STRUDWICK: I call your honor's attention also to the fact that the demurrer to the second, third, and fourth affirmative defenses was rested in part upon the ground that by the provision of this policy the policy was incontestable

after a certain length of time, and I submitted at the time the reasons why I did not think that clause would prohibit the setting up of these defenses if they were otherwise valid, and I would like to know what conclusion your honor reached upon that proposition.

The COURT: I think the incontestable clause in the contract was intended to shut off such a defense as you have set forth in the second affirmative defense after two annual premiums have been paid. I do not think the company would be bound by the clause, or precluded from contesting the liability within any length of time, unless the policy had been lived up to on both sides for two years. The second premium would have to be paid in order to give the insured the right to shut off a defense by virtue of that clause.